76-5206

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 76-

HARRY ROBERTS,

Petitioner,

-v.-

STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana entered on March 29, 1976, rehearing refused, May 14, 1976.

CITATION TO THE OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported at --La.--, 331 So.2d 11 (1976), and is set out in Appendix A hereto, at pp. 1a-6a, infra.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on March 29, 1976, rehearing refused, May 14, 1976. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of first-degree murder under the law of Louisiana violates the Eighth or Fourteenth Amendments to the Constitution of the United States.

2. Whether the failure of the trial court to order pre-trial inspection of the murder weapon by the defendant violates Due Process guaranteed by the Fourteenth Amendment to the Constitution of the United States.

3. Whether the use by the prosecutor of the defendant's juvenile record for impeachment of the defendant's testimony, coupled with the trial court's denial of a mandatory mistrial, constituted a violation of Equal Protection guaranteed by the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Revised Statutes Annotated and Code of Criminal Procedure of Louisiana:

> La. Rev. Stat. Ann. §14:27 (1974). "Attempt.
> A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would actually have accomplished his purpose.
> B. Mere preparation to commit a crime shall not be sufficient to constitute an attempt; but lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended.
> C. An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt.
> D. Whoever attempts to commit any crime shall be punished as follows:
> (1) If the offense so attempted is punishable by death or life imprisonment, he shall be imprisoned at hard labor for not more than twenty years. . . "
>
> La. Rev. Stat. Ann. §14:29 (1974) "Homicide; general provisions

Homicide is the killing of a human being by the act, procurement or culpable omission of another. Criminal homicide is of four grades:
(1) First degree murder
(2) Second degree murder
(3) Manslaughter
(4) Negligent homicide
No liability for criminal homicide shall attach unless the injured party dies within a year after the injury is inflicted."

La. Rev. Stat. Ann. §14:30 (1974) "First Degree Murder

First degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
(2) When the offender has a specific attempt to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person;
(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.
For the purposes of paragraph (2) herein, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorney's investigator.
Whoever commits the crime of first degree murder shall be punished by death."

La. Rev. Stat. Ann. §14:30.1 (1974) "Second Degree Murder

Second degree murder is the killing of a human being:
(1) When the offender has a specific intent to kill or to inflict great bodily harm; or
(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.
Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation or suspension of sentence for a period of twenty years."

La. Rev. Stat. Ann. §14:31 (1974) "Manslaughter

Manslaughter is:
(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that the average person's blood would have cooled, at the time the offense was committed; or
(2) A homicide committed, without any intent to cause death or great bodily harm.
(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or
(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1
Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years."

La. Rev. Stat. Ann. §13:1569 (1976 Supp.) "Definitions

When used in this part, unless the context otherwise, requires:
* * *
13. "Delinquent act" means an act designated a crime under the statutes or ordinances of this state, or of another state if the act occurred in another state, or under federal law. . ."

La. Rev. Stat. Ann. §13:1580 (1976 Supp.) "Decree

If the court shall find that a child is within the purview of R.S. 13:1561 through 13:1592, it may adjudge the child to be a neglected child or delinquent child as defined in La. R.S. 13:1569 or a child in need of supervision. The court in its judgment may proceed as follows:
* * *
(5) . . . No adjudication by the court upon the status of any child shall operate to impose any of the civil disabilities ordinarily resulting from conviction, nor shall any child be deemed a criminal by reason of such adjudication, nor shall such adjudication be deemed a conviction. . ."

La. Rev. Stat. Ann. §15:495 (1967) "Impeachment by evidence of conviction; condition precedent to proof by others; prohibition against cross-examination as to indictment or arrest

Evidence of conviction of crime, but not of arrest, indictment or prosecution, is admissible for the purpose of impeaching the credibility of the witness, but before evidence of such former conviction can be adduced from any other source than the witness whose cridebility is to be impeached, he must have been questioned on cross-examination as to such conviction, and have failed distinctly to admit the same; and no witness, whether he be defendant or not, can be asked on cross-examination whether or not he has ever been indicted or arrested, and can only be questioned as to conviction, and as provided herein."

La. Rev. Stat. Ann. §15:567 (1967) "Conditions precedent to execution; warrant of governor

No person sentenced to death shall be executed until a

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certified copy of the indictment, verdict and sentence shall have been sent to the governor, and a warrant shall have been issued by him, under the seal of the state, directed to the warden of the Louisiana State Penitentiary at Angola, commanding the warden to cause the execution to be done on the person so condemned in all things according to the judgment against him, and upon the date named in said warrant."

La. Rev. Stat. Ann. §15:568 (1976 Supp.) "Execution of death sentence; prior confinement of offender

The director of the Department of Corrections, or a competent person selected by him, shall execute the offender in conformity with the death warrant issued in the case. Until the time of execution, the Department of Corrections shall incarcerate the offender in a manner affording maximum protection to the general public, the employees of the department, and the security of the institution."

La. Rev. Stat. Ann. §15:569 (1967) "Place for execution of death sentence; manner of execution

Every sentence of death imposed in this state shall be by electrocution; that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room."

La. Rev. Stat. Ann. §15:570 (1976 Supp.) "Officials and witnesses present at execution; minors excluded

Every execution of the death sentence shall take place in the presence of the warden of the Louisiana State Penitentiary at Angola, or a competent person selected by him, the coroner of the parish of West Feliciana, or his deputy, and a physician summoned by the warden of the Louisiana State Penitentiary at Angola, the operator of the electric chair who shall be a competent electrician who shall not have been previously convicted of a felony, a priest or minister of the gospel, if the convict so requests it, and not less than five nor more than seven other witnesses, all citizens of the State of Louisiana; no person under the age of eighteen years shall be allowed within said execution room during the time of execution."

La. Code of Crim. Proc. Ann. art. 598 (1976 Supp.) "Effect of verdict of lesser offense

When a person is found guilty of a lesser degree of the offense charged, the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial."

La. Code of Crim. Proc. Ann. art. 770 (1969) "Prejudicial remarks; basis of mistrial

Upon motion of the defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official,

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during the trial or in argument, refers directly or indirectly to:
(1) Race, religion, color or national origin, if the remark is not material and relevant and might create prejudice against the defendant in the mind of the jury;
(2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;
(3) The failure of the defendant to testify in his own defense; or
(4) The refusal of the judge to direct a verdict.
An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial."

La. Code of Crim. Proc. Ann. art. 771 (1969) "Admonition

In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:
(1) When the remark or comment is made by the judge, the district attorney, or a court official, and the remark is not within the scope of Article 770; or
(2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comme is within the scope of Article 770.
In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial."

La. Code of Crim. Proc. Ann. art. 803 (1969) "Same (General charge; scope); charge as to included minor offenses and plea of insanity

When a count in an indictment sets out an offense which includes other offenses of which the accused could be fou guilty under the provisions of Article 814 or 815, the court shall charge the jury as to the law applicable to each offense. . ."

La. Code of Crim. Proc. Ann. art. 809 (1969) "Judge to give jury written list of responsive verdicts

After charging the jury, the judge shall give the jury a written list of the verdicts responsive to each offense charged, with each separately stated. The list shall be taken into the jury room for use by the jury during its deliberation."

La. Code of Crim. Proc. Ann. art. 814 (1976 Supp.) "Responsive verdicts; in particular

A. The only responsive verdicts which may be rendered where the indictment charges the following offenses are:
1. First degree murder:
Guilty
Guilty of second degree murder
Guilty of manslaughter
Not guilty . . ."

La. Code of Crim. Proc. Ann. art. 817 (1976 Supp.) "Qualifying verdicts

Any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

La. Code of Crim. Proc. Ann. art. 841 (1969) "When bill of exceptions must be reserved

Any irregularity or error in the proceedings cannot be availed of after verdict unless it is objected to at the time of its occurrence and a bill of exceptions is reserved to the adverse ruling of the court on such objection. Failure to reserve a bill of exceptions at the time of an adverse ruling operates as a waiver of the objection and as an aquiescence in the irregularity or ruling. This requirement shall not apply to:
(1) A ground for arrest of judgment under Article 859, or the court's ruling on a motion in arrest of judgment; or
(2) The court's ruling on a motion for a new trial based on the ground of bills of exceptions reserved during the trial."

La. Code of Crim. Proc. Ann. art. 844 (1969) "Formal bills of exceptions; signing; contents

A. The appellate court shall consider only formal bills of exceptions which have been signed by the trial judge in conformity with Article 845. In a case where the death sentence has been imposed, the appellate court, to promote the ends of justice, may consider bills that have not been timely signed by the trial judge.
B. A formal bill of exceptions shall contain only the evidence necessary to form a basis for the bill, and must show the circumstances and the evidence upon which the ruling was based. When the same evidence has been made part of another bill of exceptions, the evidence may be incorporated by reference to the other bill. Evidence as to guilt or innocence can only be taken down and transcribed as provided by law."

La. Code of Crim Proc. Ann. art. 920 (1976 Supp.) "Scope of appellate review

The following matters and no others shall be considered on appeal:
(1) An error designated in the assignment of errors; and,
(2) An error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence."

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Louisiana, entered on March 29, 1976, rehearing refused, May 14, 1976, affirming petitioner's conviction and death sentence. Petitioner, Harry Roberts, a twenty-one year old black man, was sentenced to death on September 18, 1974, in the Criminal District Court for the Parish of Orleans, New Orleans, Louisiana, after being convicted of one count of first degree murder.

The State's evidence showed that on February 26, 1974, at approximately 6:20 p.m., a neighborhood argument erupted in the vicinity of 1620 Pauger Street in the city of New Orleans. A young black man identified as being the petitioner pulled a pistol and fired approximately three shots. Trial, p. 4. The subject then ran off down the street and around a corner. During the course of the disturbance, a child was allegedly injured by the gunfire. Neighbors then called the police to report the disturbance. Tr., p. 4.

A police car with two officers, Officer John Tobin and Officer Dennis McInerney, arrived on the scene around 6:40 p.m. Tr., p. 26. Persons on the scene indicated to the officers the direction in which the assailant went, and the officers pursued the subject, locating him as he turned a nearby corner. Tr., p. 27. The officers followed the subject with their emergency lights flashing up a one-way street and then around a corner to South Rampart Street. There the officers pulled the car up onto the sidewalk in front of the subject. The subject ran to the door of the car and began shooting into it. Tr., p. 29. Officer Tobin was hit in the leg and head. Officer McInerney got out of the car and was fatally injured in the face while doing so. The subject then began to run off, while Officer Tobin shot in his direction, hitting the subject in the left leg. Tr., p. 30.

Officer Tobin, with the assistance of a bystander, then

radioed for assistance. Additional officers arrived on the scene and then reported to 914 Kerlerec Street in response to a police call. Tr., p. 142. This call went out at 6:41 p.m. Tr., p. 133. Officers arriving at the Kerlerec address (which is about four blocks from the scene of the shooting) noticed a trail of blood in front of the house at 914 Kerlerec Street. Tr., p. 145. The officers followed the trail down an alleyway beside the house at 914 Kerlerec, where the alleged murder weapon was discovered. Tr., p. 156. The officers continued to follow the blood trail over two fences, to the rear of 918 Kerlerec Street, two houses down. The officers then found blood smears on the side door of the 918 Kerlerec Street residence. Tr., p. 145.

Upon entering the said residence, the officers noticed the defendant tending to an apparent leg wound. After a scuffle, the officers succeeded in taking the defendant into custody. Tr., pp. 147-48. The defendant was taken to Charity Hospital for treatment of the leg wound. While the defendant was in police custody in the emergency room at the hospital, Officer Tobin who was also there for treatment identified the defendant as being the person who fired upon him and Officer McInerney. Tr., pp. 445-46.

The defendant took the stand in his defense and testified that there was an argument at Pauger Street, and that in the course of the argument, a neighbor threatened to shoot him. Tr., pp. 287-88. He testified further that he then left the scene and began to walk to work. As he was doing so, at a point approximately two blocks from the scene of the fatal shooting, and also two blocks from the scene of the initial argument, the defendant was shot in the leg from the rear by an unknown assailant. The defendant then sought refuge in the home at 918 Kerlerec Street. Tr., p. 290. The defendant called his mother to come to get him, and also called the operator to request police assistance. Tr., pp. 294-95. Shortly afterward, the defendant testified, the officers entered the house and

arrested him, and took him to Charity Hospital.

While at the hospital, the defendant testified, the police officers rolled Officer Tobin next to him, and then they indicated to Officer Tobin that the defendant was the person who shot him. Tr., pp. 307-08.

At the trial, the murder weapon was introduced in evidence. Two fingerprints had been sucessfully lifted from the gun, which were identified as being the defendant's. Tr., p. 240, 244. The defendant testified that sample prints were forcibly taken from him during police interrogation. Tr., 310-12.

Also at trial was produced the pellet recovered from the body of the victim at the autopsy. This bullet was flattened. Tr., p. 176. The bullet had also acquired "markings" in its trave through the body of the deceased. Tr., p. 177. The State produce an expert in firearms identification who made a positive comparison between the fatal bullet and a test bullet fired from the murder weapon. Tr., p. 215. The defense was not allowed pretrial inspection of the gun or of the pellet. Trans., Vol I, p. 17 (Motion to Suppress Revolver).

In the cross-examination of the defendant, the prosecutor mentioned certain juvenile offenses committed by the defendant. Defense counsel objected to this method of impeachment, and moved for a mandatory mistrial under Article 770 of the Louisiana Code o Criminal Procedure. The motion was denied. Tr., pp. 335-36.

The defendant was found guilty of first degree murder on August 16, 1974, by a jury of eleven white men and one black man.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner's Motion in Arrest of Judgment, based on his contention that the death sentence was in violation of the United States Constitution, specifically, the Eighth and Fourteenth Amendments, Trans., Vol. I, p. 80 (September 3, 1974), was denied by the trial court, id., at p. 81. Petitioner's Bill of Exceptions No. 16 assigned this ruling as error, and petitioner briefed this issue on appeal to the Supreme Court of Louisiana, First Supplemental Brief of Appellant, State v. Roberts, La. Sup. Ct. No. 56,952, at 7. That Court rejected the claim on its merits, one Justice dissenting, --citing its decision in State v. Hill, 297 So.2d 660 (La., 1974) as being controlling. The claim was raised again in petitioner's rehearing application, Application For Rehearing and Supporting Brief, State v. Roberts, La. Sup. Ct. No. 56,952, at 2, and this application was refused without opinion, on May 14, 1976.

II. Petitioner's Motion for Oyer of the Pistol and Bullets allegedly used in the murder, Trans, Vol. I, p. 5, was denied by the trial court. Petitioner's Bill of Exceptions No. 15 assigned this ruling as error, and petitioner briefed the issue on appeal to the Supreme Court of Louisiana, First Supplemental Brief of Appellant, State v. Roberts, La. Sup. Ct. No. 56,952, at 5. That Court rejected the claim on its merits, by distinguishing the case from that of Barnard v. Henderson, 514 F.2d 744 (5th Cir., 1975). The claim was raised again in petitioner's rehearing application, Application for Rehearing and Supporting Brief, State v. Roberts, La. Sup. Ct. No. 56,952, at 1 and 7, and this application was refused without opinion, on May 14, 1976.

III. At trial, the prosecutor asked the petitioner if he had been convicted, while a juvenile, of the offenses of theft and shoplifting. Defense counsel objected to this method of impeachment as being violative of Article 770 of the Louisiana Code

of Criminal Procedure, which requires a mandatory mistrial. The motion was denied by the trial court, Trans., Vol. III, p. 336. Petitioner's Bill of Exceptions No. 13 assigned this ruling as error, and petitioner briefed the issue on appeal to the Supreme Court of Louisiana, Original Brief of Appellant, State v. Roberts, La. Sup. Ct. No. 56,952, at 9. The Court rejected the claim on its merits, reasoning that offenses committed by juveniles were not crimes, as contemplated by Article 770, and therefore a mistrial was not mandatory. The claim was raised again in petitioner's rehearing application, together with the argument that the application of Article 770 by the court constituted a violation of Equal Protection, Application for Rehearing and Supporting Brief, State v. Roberts, La. Sup. Ct. No. 56,952, at 3. The claim was denied and the application refused without opinion, on May 14, 1976.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT OF CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF LOUISIANA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

While the instant application for a writ of certiorari was being prepared, the Court handed down its opinions in several cases involving the death penalty, notably Roberts v. Louisiana, --U.S.--, No. 75-5844, July 2, 1976. The cited case deals specifically with the issue of the imposition of the death penalty under the laws of Louisiana, the same issue intended by the present petitioner to be briefed here.

Petitioner therefore adopts the "Reasons for Granting the Writ" section of the petition for certiorari in Roberts v. Louisiana, No. 75-5844, and the argument therein presented.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FAILURE OF THE TRIAL COURT TO ORDER PRE-TRIAL INSPECTION OF THE MURDER WEAPON BY THE DEFENDANT VIOLATES DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The record below presents an important issue of general significance regarding the right of a criminal defendant to pre-trial inspection of evidence. In Louisiana, as in many criminal jurisdictions, the defendant's right to pre-trial discovery is severely limited, with a few well-defined exceptions. See, e.g., Brady v. Maryland, 373 U.S. 83 (1963); Williams v. Dutton, 400 F.2d 797 (5th Cir., 1968).

Therefore, the issue presented here is of significance to criminal jurisdictions other than Louisiana. The issue is the right of the defendant to have independent scientific tests performed on evidence prior to trial by experts retained by the defendant.

In the instant case, the prosecution had the advantage of having the alleged murder weapon subjected to ballistic tests

and also had the advantage of allowing its experts several months to examine the evidence and to draw conclusions, calling in additional experts if desired. The defendant was denied any pre-trial inspection by the trial court. The "scales of justice" were loaded as follows: The State having months to examine the evidence, and to organize the most damaging case possible; the defendant being forced to retain experts, if he can afford them, to come to court on the day of trial in hopes that the court will grant a continuance, or at least a brief recess, in order that his expert can examine the evidence in a rather hurried fashion under the watchful eyes of judge, jury and prosecutor.

A continuance to allow the defendant the time enjoyed by the State (several months) would be unthinkable. Further, the defendant does not know in advance of trial (as does the State) what the expert's findings will be. If the findings are unfavorable, the defendant may actually be placed in the position of having procured an adverse witness.

Essentially, the balance struck is the State's months of preparation, with advance knowledge of the substance of the expert testimony, versus the defendant's hurried mid-trial expert examination of a rather unpredictable outcome.

In this light, the trend of reasoning of this Court in Williams v. Florida, 399 U.S. 78 (1970) is particularly interesting. In Williams, this Court noted that the Constitution would not bar the State's request for a continuance on grounds of surprise upon introduction of alibi testimony. As well, there were no constitutional problems noticed if the State were to depose the alibi witnesses during the continuance. The Court then concluded:

> But if so utilizing a continuance is permissible under the Fifth and Fourteenth Amendments, then surely the same result may be accomplished through pre-trial discovery, as it was here, avoiding the necessity of a disrupted trial.

This reasoning leads to a similar question: if the defendant may, at trial, ask for a continuance, or at least a recess,

to examine the evidence, why may he not be allowed an examination of the evidence in advance of trial, and thereby avoid the similar disruption of the trial?

In Williams, supra, speaking of our adversary system of trial, the Court noted:

> We find ample room in that system, at least as far as "due process" is concerned, for [a rule] which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence. 399 U.S., at 82.

If indeed petitioner's trial was a "search for truth" contemplated in Williams, what was the compelling need on the part of the State to postpone defense inspection of evidence until during the trial? Why was this need so pressing that the defendant must be deprived of the right accorded the State of a thorough, unhurried examination of the evidence?

In an Louisiana case decided just prior to petitioner's trial, State v. Barnard, 287 So.2d 770 (La., 1973), the Supreme Court of Louisiana denied pre-trial inspection with the bald assertion that:

> It is the settled law of this State that an accused in a criminal case is without right to a pre-trial inspection of the evidence upon which the prosecution relies for a conviction. 287 So.2d, at 773. See also: State v. Hunter, 250 La. 295, 195 So.2d 273 (1967); State v. Shourds, 224 La. 955, 71 So.2d 340 (1954)

In Barnard, the Supreme Court of Louisiana gave no reason for the lack of the discovery requested, and rested its denial on settled caselaw. The defendant in Barnard subsequently petitioned the Fifth Circuit for relief, in the case entitled Barnard v. Henderson, 514 F.2d 744 (5th Cir., 1975). In reversing the conviction, the Court noted:

> The question is not one of discovery but rather the defendant's right to the means necessary to conduct his defense. Justice Barham of the Supreme Court of Louisiana pointed out in his dissent to the majority opinion in Barnard that "the only means by which the defendant can defend against expert testimony by the State is to offer expert testimony of his own." 287 So. 2d at 778. We agree. Fundamental fairness is violated when a criminal defendant on trial for his liberty is denied the opportunity to have an expert

> of his choosing, bound by appropriate safeguards, examine a piece of critical evidence whose nature is subject to varying expert opinion. 514 F.2d, at 746.

The Louisiana Supreme Court, in petitioner's appeal, attempted to distinguish Barnard from the instant case by the observation that the petitioner did not demonstrate the necessity for pre-trial discovery. But, the petitioner asked, how can the defendant demonstrate the necessity for inspection other than by producing in court a conflicting expert opinion? And how may the defendant obtain this opinion if not through pre-trial inspection?

The circular reasoning of the Louisiana Supreme Court notwithstanding, the basic reason for denial of discovery is not discussed: this unspoken reason is assumed to be unimpeachable due to years of precedent.

The petitioner is not the only defendant to be subjected to this harsh, unreasonable rule, and the Court's consideration of this issue will affect more than only the petitioner's case. There must be somereason for the denial of pre-trial inspection of evidence: some reason more sound than the mere assertion that there is no pre-trial discovery in criminal cases.

The Court should therefore grant certiorari to consider whether the denial of pre-trial inspection of evidence constitutes a violation of Due Process.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE USE BY THE PROSECUTOR OF THE DEFENDANT'S JUVENILE RECORD FOR IMPEACHMENT, COUPLED WITH THE DENIAL OF A MANDATORY MISTRIAL, CONSTITUTED A VIOLATION OF EQUAL PROTECTION GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

This issue is one of general significance, at least to Louisiana defendants, since it involves the question of the use of juvenile records for impeachment.

At the trial herein, the petitioner took the stand to testify in his defense. During the cross-examination of the petitioner, the prosecutor asked the petitioner if he had ever

plead guilty in juvenile court to the charges of theft and shoplifting, also mentioning in the presence of the jury the docket number and division of the juvenile case. Trial, p. 335. Defense counsel thereupon moved for a mistrial, asserting that Article 770 of the Louisiana Code of Criminal Procedure was controlling. That article provides, in pertinent part:

> Upon motion of the defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:
>
> * * *
>
> (2) Another crime committed or alleged to have been committed by the defendant as to which evidence is not admissible;
>
> * * *
>
> An admonition to the jury to disregard the remark shall not be sufficient to prevent a mistrial. . . .

In accordance with the proscription of Section (2) of Article 770, La. R.S. 15:495 provides that only evidence of conviction of crime shall be used for impeachment. La. R.S. 13: 1580(5) further provides that a juvenile adjudication is not a conviction. For this reason, evidence of a juvenile record is improper for impeachment. The Louisiana Supreme Court admitted this much. State v. Roberts, 331 So.2d, at 13. However, the Louisiana Supreme Court also noted that juveniles adjudged to have committed offenses have not committed "crimes," but have committed "delinquent acts," as defined by La. R.S. 13:1569(13).

The Louisiana Supreme Court appears to have overlooked the fact that the prosecutor did not explain to the jury the legal distinction between "crimes" and "delinquent acts." The jury was presented with the words "theft" and "shoplifting", and it may be reasonable to assume, that in the absence of instructions to the contrary, they were viewed by the jury as bein crimes.

The Supreme Court of Louisiana did not adopt the arguments presented by the State on this point. The distinction between

Crimes and juvenile delinquent acts was developed by the court, and it was only in the application for rehearing that the petitioner was able to present his Equal Protection argument.

The difference in treatment among criminal defendants under the opinion of the Louisiana Supreme Court may be demonstrated as follows: Should a defendant be impeached by mention of past inadmissible crimes or allegations thereof, such as, foe example, an arrest but not a conviction of a misdemeanor, this impeachment would require a mandatory mistrial under Article 770. However, should a juvenile record be used for impeachment, as it was here, with mention of a number of crimes by name, but without mention of the fact that they are not "crimes, but rather "delinquent acts," there is no mistrial requirement, and a mere admonition would suffice. The denial to a prior juvenile offender of the protection afforded by Article 770 operates as a deniai of Equal Protection, there being no rational distinction between the prejudice caused an arrestee and that caused a juvenile offender in the situations outlined above.

It is clear that the interpretation of Article 770 by the Louisiana Supreme Court shows that the "State has accorded bedrock procedural rights to some, but not to all similarly situated." Stanley v. Illinois, 405 U.S. 645, at 658 n. 10 (1972) This Court should grant certiorari to consider this denial of Equal Protection, since the holding of the Louisiana Supreme Court affects defendants in Louisiana other than only the petitioner.

CONCLUSION

Petitioner prays that his petition for a writ of certiorari be granted.

GARLAND R. ROLLING
Attorney for Petitioner
319 Metairie Road
Metairie, Louisiana 70005
(504) 835-2543

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5206

HARRY ROBERTS,

Petitioner,

—*v.*—

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

PETITION FOR CERTIORARI FILED AUGUST 12, 1976
CERTIORARI GRANTED NOVEMBER 8, 1976

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5206

HARRY ROBERTS,

Petitioner,

—*v.*—

STATE OF LOUISIANA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

INDEX

CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS

No. 241-775

STATE OF LOUISIANA

versus

HARRY ROBERTS

Indictment For VIO. R.S. 14:30

MINUTE ENTRIES IN CHRONOLOGICAL ORDER

* * * *

Wednesday, April 3, 1974

Pursuant to adjournment Court met this day at 10:15 A.M.

* * * *

The defendant appeared at the bar of the Court for arraignment, attended by counsel, Garland R. Rolling, Esq., who, on behalf of the defendant, after the bill of indictment was read aloud in open Court to the defendant and after counsel for defense waived the reading of the other bills of information, entered pleas of Not Guilty and was granted twenty (20) days in which to file special pleadings. The Court ordered a pre-trial conference set on May 1, 1974 and will then hear any motions on the said date.

* * * *

Wednesday, May 1, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

* * * *

In Case No. 241-775, Garland R. Rolling, Esq., filed with the Court, an Application for Bill of Particulars and Application for a Lunacy Commission as to Present Sanity

of Accused, which motions the Court ordered received and filed. The Court granted the Application for a Lunacy Commission as to Present Sanity of Accused and appointed Dr. Gene Usdin to examine the defendant. Pre-trial conference as to all cases set for this day were cancelled.

* * * *

Thursday, May 30, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

* * * *

Garland R. Rolling, Esq., filed with the Court a Prayer for Oyer of Any Written Statements or Written Confessions signed by Harry Roberts and any and All Grand Jury Minutes, which the Court ordered received and filed.

* * * *

Friday, June 14, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

* * * *

The defendant appeared at the bar of the Court for hearing on Lunacy Commission attended by counsel, Garland R. Rolling, Esq. After lunacy hearing held this day, the Court ruled the defendant presently sane and able to stand trial and to understand the proceedings and to assist counsel, to which ruling of the court counsel for defense objected and reserved a bill of exceptions, all as noted by the Court Reporter. Counsel for the State filed with the Court answers to Prayer for Oyer and Application for Bill of Particulars, which the Court ordered received and filed. After hearing held this day the Court ruled the State's answer to Prayer for Oyer as good and sufficient in law, to which ruling of the Court, counsel for defense reserved a bill of exceptions, to paragraph #2, all as noted by the Court Reporter. After hearing held this day the Court ruled the state's answer to Bill of Particulars as good and sufficient in law, to which ruling of the Court, counsel for defense reserved a bill

of exceptions as to paragraphs 4 thru 11 and 13 thru 17, all as noted by the Court Reporter. The Court ordered this matter set for trial on August 12, 1974.

* * * *

Monday, July 1, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

* * * *

Garland R. Rolling, Esq., filed with the Court a Motion to Suppress Identification, Motion to Suppress Revolver and Bullets, Application for Bill of Particulars and Prayer for Oyer, which motions the Court ordered received and filed and set the hearings on July 17, 1974.

* * * *

Monday, July 15, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

* * * *

The Court ordered this matter cancelled from the docket of August 12, 1974 and reset for trial on September 10, 1974.

* * * *

Wednesday, July 17, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

* * * *

The defendant was present at the bar of the Court for hearing on Motion to Suppress Identification, attended by counsel, Garland R. Rolling, Esq. Lawrence Centola, Jr., Assistant District Attorney was present representing the State, and filed with the Court the State's answer to Motion to Suppress Identification, Answer to Motion to Suppress Revolver and Bullets, Answer to Prayer for Oyer, Answer to Application for Bill of Particulars and Answer to Prayer for Oyer for Telephone Call, which answers the Court ordered received and filed. Counsel for defense filed with the Court a Motion to

Quash and Counsel for the State filed the State's Answer to Motion to Quash. After hearing held this day, the Court denied the Motion to Quash, to which ruling of the Court, counsel for defense reserved a Bill of Exceptions, all as noted by the Court Reporter. After hearing held this day on the Motion to Suppress Identification, the Court overruled the said motion, to which ruling of the Court, counsel for defense reserved a Bill of Exceptions, all as noted by the Court Reporter. During the said hearing, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. After hearing held this day the Motion to Suppress the Revolver and Bullets, the Court overruled the said motion, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. During the hearing counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. After hearing held this day on Prayer for Oyer, the Court denied the said motion, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. After hearing held this day on the Prayer for Oyer, the Court denied the said motion, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. After hearing held this day on the Bill of Particulars, the request was denied by the Court, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. After hearings held this day the Court ordered the trial of this case set on August 15, 1974 in lieu of August 12, 1974.

* * * *

Thursday, August 1, 1974

Pursuant to adjournment the Court met this day at 9:35 A.M.

* * * *

Garland R. Rolling, Esq. filed with the Court a Motion for Subpoena Duces Tecum, which the Court ordered received and filed and made returnable on August 15, 1974.

* * * *

Wednesday, August 7, 1974

Pursuant to adjournment Court met this day at 10:15 A.M.

* * * *

Garland R. Rolling, Esq. filed with the Court a Motion and Order to Disclosure of Any Favorable Evidence, Motion to Quash, Motion for Subpoena Duces Tecum #1, Motion for Subpoena Duces Tecum #2 and Motion to Continue, which motions the Court ordered received and filed and hearings are to be held this day. The defendant was present at the bar of the Court attended by counsel, Garland R. Rolling, Esq. and William Wessell, Assistant District Attorney who represented the State. After hearing held this day on the Motion and Order Disclosure of Any Favorable Evidence, Counsel for defense was satisfied with the State's Answers. After hearing held this day on the Motion to Quash, the Court denied the said motion, to which ruling of the Court counsel for defense reserved a Bill of Exceptions, all as noted by the Court Reporter. During the hearing Mrs. Roberts, the defendant's mother and Harry Roberts, the defendant, were duly sworn by the clerk and gave testimony, all as noted by the Court Reporter. The Court maintained the trial date as August 15, 1974.

* * * *

Thursday, August 15, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

Present: The Honorable Jerome M. Winsberg, Judge.

* * * *

Now into Court comes Harry Connick, Esq., District Attorney and William Wessel, Esq., Executive Assistant District Attorney, who prosecute for the State. The defendant was present and represented by Garland R. Rolling, Esq., who filed with the Court two (2) Subpoena Duces Tecum made returnable August 16, 1974 and Motion for Change of Venue, which the Court ordered received and filed. Counsel for defense stipulated as to

the form of Motion to Change Venue, all as noted by the Court Reporter. The Court took the Venue Motion under advisement and counsel for defense made an oral Motion for Continuance. The State objected. The Court denied the said motion, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Both sides being ready, the Court ordered the trial to begin. Edward D. Callan, Leonard E. Bendy, Michael F. Mesisco, Philip Burg, Alfred Normand, Edward W. Martin, Joseph W. Miller, Jr., Robert Nugen, Leonard Jos. McCaffery, George D. Severson, Charles Clyde Wells, and Hank R. Friedberg, were duly sworn accepted by both the State and defense and sworn to serve as jurors in this case. The State used nine (9) peremptory challenges and the defense used thirteen (13) peremptory challenges. Thirteen (13) jurors were excused for cause and twenty-nine (29) jurors were excused by consent. During the Voir Dire, counsel for defense reserved twenty-seven (27) bills of exceptions, all as noted by the Court Reporter. The Court granted the counsel one additional challenge for the purpose of choosing an alternate juror, to which counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Both counsel for the State and defense stated they were ready to proceed without an alternate juror. The Court then denied the Motion for a Change of Venue, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Counsel for the State filed a Notice of Intent to Use Inculpatory Statement, which the Court ordered received and filed. Outside the presence of the jury counsel for defense moved for permission of Mr. and Mrs. Roberts, parents of the defendant, to remain in Court during the proceedings. There being no objection by the State and no motion for sequestration by the State or defense, the Court granted the motion. In the presence of the jury the Bill of Indictment was read aloud in open court. Mr. Wessel made the opening statement in behalf of the State. Counsel for defense waived the opening statement. Theresa Dorsey was duly sworn by the clerk, testified on the part of the State and was

cross examined by defense. During the testimony of the said witness, Counsel for the State marked for identification S-1-S, a plastic bag, containing a pair pants, S-1-B, a plastic bag containing clothing, S-1-C, a plastic bag containing a red handkerchief, S-7, a pair of shoes, S-10, a revolver, S-17, a large photograph of the scene. Sylvester Saunders, Patrolman John P. Tobin, Frank M. Valleck, Lawrence Matherne, David Bass Williams, Herry Britton, Patrolman Merlin Lindsey, Sgt. Elmo H. Boepple, Theodore Constantine and Patrolman Richard Baumy, were duly sworn by the clerk, testified on the part of the State and each were cross examined on the part of the defense, with the exceptions of witnesses, Merlin Lindsey and Sgt. Elmo H. Boepple. During the testimony of Patrolman John P. Tobin, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. During the testimony of Patrolman John P. Tobin, Counsel for the State marked for identification, S-2, photograph, S-3, a photograph, S-4, a photograph and S-6, a photograph. During the testimony of Lawrence Matherne, Counsel for the State marked for identification, S-3, a photograph. During the testimony of Officer Merlin Lindsey, Counsel for the State marked for identification, S-8, a photograph and S-9, a photograph, and S-5, a photograph. During the testimony of Richard Baumy, Counsel for the State marked for identification, S-7-A, evidence tag. The Court then ordered the trial recessed until, Friday, August 16, 1974 at 9:00 A.M.

* * * *"

Friday, August 16, 1974

Pursuant to adjournment Court met this day at 9:00 A.M.

* * * *

(SECOND DAY OF TRIAL)

Having been continued from Thursday, August 15, 1974, the defendant was placed at the bar of the Court attended by counsel, Garland R. Rolling, Esq., for the further of the trial. Harry Connick, District Attorney and

William Wessel, Executive Assistant District Attorney were present and represented the State. Both sides being ready the Court ordered trial to resume. The jury was present and in their respective seats in the jury box. Patrolman Allen Tidwell, Mable Domingo, Patrolman James Doll, Wilma W. Clark, Patrolman Michael Daros, Patrolman Richard Marino, Criminalist Paul Wertz, Dr. Ronald Welch, William Gurvich, Patrolman Martin Alonzo, Dorothy Brumbfield, Patrolman Wayne H. Cooper, Criminalist Joseph DaPaoli, Patrolman Robert Townsend and Patrolman Daniel O'Neil were duly sworn by the clerk, testified on the part of the State and were cross examined by defense with the exceptions of Patrolman Allen Tidwell, Wilma W. Clark, William Gurvich and Criminalist Joseph DaPaoli. During the testimony of Patrolman James Doll, Counsel for the State marked for identification, S-18-A, IBM Card, S-18-B, IBM Card and counsel for defense and the State stipulated as to the Official copy of arrest register, marked for identification, D-1, all as noted by the Court Reporter. During the testimony of Patrolman Richard Marino, Counsel for defense marked for identification, D-2, a photograph, D-3, a photograph and D-4, a photograph. After the proper predicate had been laid, the Court ruled the Dr. Welch, as an expert in the field of pathology. During the testimony of Dr. Welch, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Also during the testimony of Dr. Welch, Counsel for the State marked for identification S-12, a spent pellet and S-11, autopsy Protocol. During the testimony of Dorothy Brumfield, Counsel for the State marked for identification S-11-A, process verbal, and offered filed in evidence S-11 and S-11-A. The Court ordered said exhibits admitted into evidence and counsel for defense reserved bills of exceptions, all as noted by the Court Reporter. During the testimony of Criminalist Joseph DaPaoli and after the State laid the proper predicate the Court ruled the said witness as an expert in the field of analysis of blood stains and in the identification of bullet holes, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court

Reporter. During the testimony of Patrolman Robert Townsend and after proper predicate had been laid the Court ruled the witness as an expert in the field of firearms identification, to which ruling of the Court counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Also during the testimony of the said witness, Counsel for the State marked for identification, S-14, test pellet and S-13, five (5) spent and one (1) live cartridge. During the testimony of Patrolman Daniel O'Neil, and after the State laid the proper predicate the Court ruled the witness as an expert in the field of fingerprinting identification, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Counsel for the State then marked for identification S-15, fingerprint slide, S-16, two (2) photographs of fingerprints identification, S-16-A, a photo print on left hand and S-16-B, photo print on right hand. Counsel for the State then moved to file in evidence, S-1-A thru 10, S-12 thru S-18-B and the Court ordered the said exhibits admitted into evidence, to which ruling of the Court, counsel for defense reserved twenty-one (21) bills of exceptions, all as noted by the Court Reporter. The State rests. The Court ordered a recess for lunch. In Chambers, without objection and with the defendant, his counsel, the defendant's parents and both Counsel for the State present, the Court admonished Mrs. Roberts as to the alleged complaints to the District Attorney, of threats upon witnesses, all as noted by the Court Reporter. The Court ordered the trial to resume in the Courtroom outside the presence of the jurors, at which time counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. The jury was returned to the Courtroom and in the presence of the jury, Joseph Newbrough, Felix Schillesci, Patrolman Richard Marino, Patrolman Lloyd Hoffmeister, Harry Roberts, Mr. Harry Roberts, Sr., Winetta Slack, Arlene Woods and Mrs. Harry Roberts, Sr, (recalled), were duly sworn by the clerk, testified on the part of the defense and were cross examined by the State with the exceptions of Joseph Newbrough, Patrolman Richard Marino, Patrolman Hoffmeister and Arlene

Woods. During the testimony of Joseph Newbrough, both Counsel for the State and defense stipulated as to the many photographs. Counsel for defense marked for identification D-5, 6, 7, 8, 9, 11, 10, 12, 13, 14, 15, 16, 17, 18 and 19. During the testimony of Felix Schillesci, counsel for defense marked for identification D-20, a large photograph and offered filed in evidence the exhibits D-2 through D-20. The State objected. The Court overruled the objection and ordered the said exhibits admitted into evidence. During the testimony of Harry Roberts, counsel for defense moved for a mistrial, which motion the Court denied to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. During the testimony of Mr. Harry Roberts, Sr., counsel for defense moved for the jury to view the exhibits D-2 thru D-20. There being no objections by the State, the Court ordered the jury to view the said exhibits. During the testimony of Winetta Slack, Counsel for the State marked for identification S-19, in globo, a letter. The Court ordered a recess. Outside the presence of the jury, counsel for defense called Dr. Joseph P. Breaux; no response and the defense requested the return on Dr. Breaud be read into the record. Counsel for the defense then made a Motion for Continuance to be supplemented in writing. The court denied the motion, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Counsel for defense made oral Motion to Continue due to the absence of the defense witness, John Luned, and the Court denied the motion, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. The jury returned to the Courtroom and in the presence of the defendant, his counsel and Counsel for the State, the Court ordered the trial resumed. Both counsel for the State and defense entered into stipulation as to the would be testimony of a hospitalized potential witnesses's testimony, Dorothy Snead. During the testimony of Arlene Woods, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. During the testimony of Mrs. Harry Roberts, Sr., counsel for

defense marked for identification and offered filed in evidence D-21, a mailgram. The State objected. The Court sustained the objection to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. The defense rests. In rebuttal, Lawrence Kenner, Ethel Harris, Pamela Batiste, Sally Ann Bradley, Delores Williams, Dorothy Saunders, Mable Domingo, Patrolman George Tolar and Patrolman Marcal David, Patrolman Bruce Hubbie, Lt. Robert Muth and Patrolman John Tobin, were duly sworn by the clerk, testified on the part of the State and were cross examined by defense with the Ptn. John Tobin, Ptn. Bruce Hubble and Ptn. George Tolar. During the testimony of Patrolman George Tolar, counsel for defense reserved two (2) bills of exceptions, all as noted by the Court Reporter. During the testimony of Officer Marcal David counsel for defense offered filed in evidence, D-1. The State objected and was sustained by the Court, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. During the testimony of Lt. Robert Muth, Counsel for the State marked for identification, S-21, rights of arrestee form. During the testimony of Patrolman John Tobin, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. Also during the testimony of said witness, counsel for the State offered filed in evidence, S-20. Defense objected, was overruled, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. State rests. Counsel for defense moved to reopen defense case. The State objected. The Court denied the said motion, to which ruling of the Court, counsel for defense reserved a bill of exceptions, all as noted by the Court Reporter. 6:15 P.M. Mr. Wessel made the closing argument to the jury on behalf of the State. 6:42 P.M. Mr. Rolling made the closing argument to the jury on behalf of the defense. 7:11 P.M. Mr. Connick made the rebuttal argument to the jury on behalf of the State. Counsel for the State filed with the Court a Request for Jury Instruction, which the Court ordered received and filed. 7:37 P.M. The Court

charged the jury as to the law pertaining to this case. 7:37 P.M. The Court charged the jury as to the law pertaining to this case. The Court granted the requested Charge No. and it was given to the jury. The Court denied the requested Charge No. 2 and No. 3, 8:11 P.M. The Jury retired to deliberate its verdict. 8:55 P.M. The Jury returned to the Courtroom and in the presence of the defendant, his counsel and Counsel for the State, returned the following written verdict:

"New Orleans, Louisiana, August 16, 1974, We, the jury, find the defendant, Guilty as Charged. (Signed) Hank R. Friedberg, Foreman." On motion by defense the jury was polled and it was found to be a legal verdict and the Court ordered the verdict recorded, thanked the jurors for their services and discharged them from this case. The Court ordered the matter set for sentence 9, 1974.

• • • •

Tuesday, September 3, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

• • • •

Garland Rolling, Esq. filed with the Court two (2) Written Motions for Continuance, which motions were filed orally during the trial of his case and denied. The Court ordered both motions received and filed. Counsel for defense then filed a Motion in Arrest of Judgment and a Motion for a New Trial, which motions the Court ordered received and filed and hearings set September 9, 1974.

• • • •

Monday, September 9, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

• • • •

Counsel for the Defendant, Garland Rolling, Esq., appeared at the bar of the Court and waived the presence of the defendant for the purpose of motions. Counsel for defense filed with the Court a Motion to Continue Sentencing and Motion in Arrest of Judgment and Motion for a New Trial, which motions the Court ordered received and filed. The Court granted the Motion for

Continuance and ordered the sentencing reset September 16, 1974. Counsel for defense then filed with the Court a Motion to Allow Harry Roberts Furlough From Jail to Attend His Father's Funeral, which motion the Court ordered received and filed and denied.

• • • •

Monday, September 16, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

• • • •

The defendant appeared at the bar of the Court for hearings on Motion In Arrest of Judgment and Motion for a New Trial, attended by counsel, Garland Rolling, Esq. After hearing held this day, the Court denied the Motion In Arrest of Judgment and Motion for a New Trial, to which rulings of the Court, counsel for defense reserved bills of exceptions, all as noted by the Court Reporter. Counsel for defense, before hearings, filed with the Court a Memorandum, which the Court ordered received and filed. The Court then ordered the sentencing continued and reset September 18, 1974.

• • • •

Wednesday, September 18, 1974

Pursuant to adjournment Court met this day at 9:30 A.M.

• • • •

The defendant appeared at the bar of the Court for sentence, attended by counsel, Garland Rolling, Esq. who filed with the Court a Motion for Continuance, which the Court ordered received and filed. Counsel for the State objected to the motion. The Court denied the motion to continue. The Court sentenced the defendant to be remanded to the Parish Prison to remain awaiting his removal to the Louisiana State Penitentiary at Angola to be executed. To be put to Death in the manner prescribed by law. Court costs waived. Counsel for defense filed with the Court a Motion for Appeal, which the Court ordered received and filed and made returnable November 18, 1974.

• • • •

CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS

Police Item No. 25259-74
B-25259-74
241-775

THE STATE OF LOUISIANA)
) ss
PARISH OF ORLEANS)

INDICTMENT

THE GRAND JURORS of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of Orleans, in the name and by the authority of the said State, upon their oath, PRESENT That one HARRY ROBERTS late of the Parish of Orleans on the TWENTY-SIXTH day of FEBRUARY in the year of our Lord, one thousand, nine hundred SEVENTY-FOUR with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans committed first degree murder of one, DENNIS McINERNEY contrary to the form of Statute of the State of Louisiana in such cases made and provided and against the peace and dignity of the same.

/s/ [Illegible]
District Attorney for the
Parish of Orleans

CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 241-775 SECTION "C" DOCKET:

FILED: _____ _____
Deputy Clerk

STATE OF LOUISIANA

vs.

HARRY ROBERTS

MOTION TO QUASH DUE TO THE UNCONSTITUTIONALITY OF THE MURDER STATUTE

Now into court through his undersigned counsel comes petitioner, Harry Roberts, and files this Motion to Quash on the grounds that the statute under which the said Harry Roberts was indicted is in violation of the laws of the State of Louisiana and the United States of America and the indictment of the same has not in fact cured the unconstitutionality of the said statute.

/s/ Garland R. Rolling
GARLAND R. ROLLING
Attorney for Petitioner
319 Metairie Road
Metairie, Louisiana 70005
835-2543

ORDER

Let the District Attorney for the Parish of Orleans on the 17th day of July, 1974, at 10:00 a.m. show cause as to why the statute for murder under which Harry Roberts was indicted should not be held unconstitutional and the indictment dismissed.

New Orleans, Louisiana, this 17th day of July, 1974.

_____

Judge

Denied.

/s/ Jerome M. Winsberg
July 17, 1974

[Certificate of Service Omitted in Printing]

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
NO. 241-775, SECTION "C"

STATE OF LOUISIANA

vs.

HARRY ROBERTS

ANSWER TO MOTION TO QUASH

Now into Court comes the State of Louisiana, through the undersigned Assistant District Attorney for the Parish of Orleans, and for answer to the defendant's Motion to Quash, states that:

The State denies the allegations of fact and law contained in the defendant's Motion to Quash, and calls for strict proof thereof.

WHEREFORE, the State prays that its answer be deemed good and sufficient, and that defendant's Motion to Quash be denied.

/s/ Lawrence J. Centola, Jr.
LAWRENCE J. CENTOLA, JR.
Assistant District Attorney

CRIMINAL DISTRICT COURT FOR THE
PARISH OF ORLEANS

TESTIMONY TAKEN AT TRIAL, AUGUST 16, 1974

(From *Trial* transcript in record, pp. 136-137)

MRS. HILDA W. CLARK, was called as a witness by the State; and after having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WESSEL:

Q What is your full name, please?
A Hilda W. Clark, Mrs.
Q Mrs. Clark, by whom are you employed, and in what capacity?
A I'm employed by the City of New Orleans and assigned to the New Orleans Police Department.
Q In any particular area?
A I'm in the payroll division; I'm an Account Clerk II.
Q Did you bring with you the payroll records of one, Dennis McInerney?
A I do; I have them.
Q Do those records reflect whether or not Dennis McInerney was an employed police officer with the New Orleans Police Department on February twenty-sixth, 1974?
A In my opinion, Yes, Sir.
Q Well, do the records reflect that?
A Yes, sir.
Q Do those records show the date of appointment of Dennis McInery?
A Yes.
Q And does it show any termination date?
A Yes.
Q What is the termination date?
A The twenty-sixth of February.

Q Does it show the reason for the termination?
A Deceased.
MR. WESSEL: I have no further questions.
MR. ROLLING: No questions.
THE COURT: Thank you. You can step down. You can go.

• • • •

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

• • • •

(September 18th, 1974—Sentencing)

THE COURT: Harry Roberts, the Jury in this case, duly empaneled and sworn, having found you guilty of murder as charged in the indictment and you having been first asked why the sentence of the law should not be pronounced upon you, it is hereby ordered, and it is the sentence of this Court, that you, Harry Roberts, be remanded to the Parish Prison of the Parish of Orleans, there to remain in the custody of the Criminal Sheriff of the Orleans, and there to remain awaiting your removal to the Louisiana State Penitentiary at Angola until the day and hour fixed by the Governor of the State of Louisiana for your execution, at which time and place to be designated by the Governor of this State in his warrant, you, Harry Roberts, shall then and there be put to death in the manner prescribed by law, that is, by causing to pass through your body a current of electricity of sufficient intensity to cause death and by the application and continuance of such current through your body until you are dead, dead, dead, and may God have mercy on your soul.

• • • •

SUPREME COURT OF LOUISIANA

March 29, 1976

No. 56952

STATE OF LOUISIANA, APPELLEE

v.

HARRY ROBERTS, APPELLANT

REHEARING DENIED MAY 14, 1976

Defendant was convicted in Criminal District Court, Orleans Parish, Jerome Winsberg, Jr., of first-degree murder, and sentenced to death, and he appealed. The Supreme Court, Tate, J., held that, inter alia, the prosecutor's reference to a juvenile offense by the defendant was cured by the judge's cautionary instruction; that pretrial oyer of a pistol and bullet was properly denied; and that the State was properly allowed to challenge for cause jurors who would not impose the death penalty under any circumstances.

Affirmed.

Summers, J., concurred in result and assigned reasons.

Dixon, J., dissented in part and concurred in part.

Calogero, J., concurred with reservation.

1. Witnesses—337(6)

It was improper impeachment of murder defendant's credibility for prosecutor to ask him if he had previously pleaded guilty in juvenile court to theft and shoplifting. LSA-R.S. 13:1580(5), 13:1586, 15:495.

2. Criminal Law—1170½(6)

Improper impeachment of defendant's credibility by prosecutor's question whether he had previously pleaded guilty in juvenile court to theft and shoplifting charges was cured by trial court's cautionary instructions to jury

after defendant's objection was sustained. LSA-R.S. 13:1580(5), 13:1586, 15:495; LSA-C.Cr.P. arts. 770, 771.

3. Criminal Law—1166(1)

First-degree murder conviction would not be reversed because of denial of opportunity for pretrial ballistic testing where such testing was not shown to have been relevant to any issue of accused's defense.

4. Jury—108

Record in first-degree murder prosecution showed no error in trial court's determination that, despite some initial ambiguity, veniremen disclosed that they would not impose death penalty under any circumstances and thus were properly discharged for cause. LSA-C.Cr.P. art. 798(2).

5. Jury—33(5)

Removal from jury service of 25 veniremen opposed to death penalty did not deprive defendant in first-degree murder prosecution of jury representative of people to which accused was constitutionally entitled. LSA-C.Cr.P. art. 798(2).

6. Criminal Law—339

In the first-degree murder prosecution for killing of police office, in-court identification of defendant by another policeman whom he had also shot was not tainted by chance face-to-face encounter between witness and defendant at hospital.

7. Searches and Seizures—3.3(4)

Police officers looking for wounded perpetrator of murder committed minutes before were entitled to follow bloody residue into alley within block of murder and to pick up abandoned pistol in plain view in alley.

8. Criminal Law—1213

Death penalty provided for first-degree murder was constitutional. LSA-R.S. 14:30.

Garland R. Rolling, Metairie, for defendant-appellant.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Harry F. Connick, Dist. Atty., Louise S. Korns, Asst. Dist. Atty., for plaintiff-appellee.

TATE, Justice.

The defendant was convicted of first degree murder, La.R.S. 14:30 (1973), and sentenced to death. Upon his appeal, he relies upon seventeen assignments of error.

The most arguable contentions are raised by assignments 13, 15, and 17 (adopting the enumeration in the appellant's brief). These relate respectively to: the denial of a mistrial based upon the prosecutor's reference to a juvenile offense of the defendant; the denial of pretrial oyer of a revolver and bullets used in the killing for purposes of ballistic testing; and the excusing, upon the prosecutor's challenger for cause, of twenty-five jurors on the basis of their views relating to imposition of the death penalty.

Context Facts

The evidence of the state's witnesses proved:

At about 6:30 p.m. on Mardi Gras, 1974, the defendant Roberts became involved in a quarrel with his neighbors. Drawing a pistol, he fired blindly at them, striking a 13-year-old boy.

Responding to a radio call, Police Officers Tobin and McInerney arrived at the scene within minutes. Roberts was still in sight, about a block away. He was walking swiftly. The police officers followed him in their vehicle through the crowded carnival streets.

The police vehicle caught up with Roberts within three blocks. When the officers called to him, Roberts approached, pulled out a pistol and shot the driver Tobin as he was opening his door, and shot at Officer McInerney as he was descending from the passenger side. When McInerney fired back (hitting Roberts in the left leg), Roberts shot and killed the police officer.

Roberts left a trail of blood. He was located within a block of the shooting. He had broken into a home and had telephoned his mother to come for him.

The gun used in the killing was found at the rear of an alleyway by which Roberts had approached the home into which he had broken. His fingerprints were found on the weapon. Blood drippings were near the pistol, as they were at the entrance to the alleyway.

Roberts fought the arresting police desperately when they arrived at the house.

Roberts took the stand in his own defense. He admitted the neighborhood quarrel, but denied that he had used a gun (or that he had ever possessed one). He stated that, while leaving the scene, he had been shot in his leg by a party unknown.

Roberts admitted that he had gone down the alley to the house in which he was found. He indicated that his use of the telephone was with the consent of the home's inhabitants, in order to locate his mother and to inform the police of the shooting. (The inhabitants testified that Roberts had broken into their home through a side-door.)

The essence of the accused's defense was that some other man had shot the policeman a block or so away from the shooting of himself by a party unknown.

We do not find his assignments of error to have merit, for the following reasons:

Assignment 13: The prosecutor's reference to a juvenile offense

The accused took the stand in his own defense. Upon cross-examination, the prosecutor asked him if in 1970 he had pleaded guilty in juvenile court to theft and shoplifting. The district court sustained a defense objection to the question and admonished the jury to disregard the question.

[1] As the defendant points out, by express statutory provision, an adjudication that a juvenile has committed an offense is not a determination that the child was a criminal, "nor shall such adjudication be deemed a conviction." La.R.S. 13:1580(5) (1974). It was thus improper impeachment of the appellant's credibility, since only a *conviction* of a *crime* may be used for such purpose. La.R.S. 15:495. (Furthermore, juvenile records are

ordinarily privileged information. La.R.S. 13:1586 (1950).)

[2] The defendant contends that the admonition to the jury to disregard the prosecutor's question was insufficient to cure the prejudice resulting from the prosecutor's reference to the inadmissible juvenile offense. He contends that La.C.Cr.P. art. 770 mandatorily requires a mistrial when the prosecutor "refers directly to . . . another *crime* committed or alleged to have been committed by the defendant *as to which evidence is not admissible.*"

The mandatory mistrial required by the code article within its literal terms includes only improper references to "crimes", not to juvenile adjudications. While, as the trial court held, the prosecutor's reference to the inadmissible juvenile offense was improper, it is not governed by Article 770 (requiring mistrial) but rather by Article 771. The latter provision permits an admonition to the jury to cure the prejudice, providing that the trial court is satisfied that an admonition rather than mistrial is sufficient to assure the defendant a fair trial.

We find no abuse of the trial court's discretion in denying a mistrial:

As noted, the trial court sustained the objection to the question and promptly admonished the jury to disregard it. The question concerned a single non-violent petty offense of a juvenile. As permitted by La.R.S. 15:495, the jury additionally received evidence of the defendant's conviction of two post-juvenile crimes, for purposes limited to impeaching credibility.

The admonition of the trial court to disregard the question cured, in our opinion, whatever additional prejudice the accused might otherwise have sustained by the question's inference that he had also been convicted of a petty offense while still a juvenile.

Assignment 15: Denial of pre-trial oyer of pistol and bullet

[3] At the trial, the pistol found in the vicinity was, by ballistic tests, identified as the weapon which fired the

bullet which killed Officer McInerney and which was found in his body.

By pre-trial motion, the accused had sought oyer of the pistol and bullet for the purpose of making ballistic tests. The trial court denied the motion on the authority of *State* v. *Barnard*, 287 So.2d 770 (La.1973). However, subsequent to the trial, the federal courts have set aside the *Barnard* conviction. The federal Fifth Circuit held that the denial of pre-trial ballistic tests, under the circumstances there shown, was a denial of the right to a fair trial and adequate preparation of a defense required by federal due process. *Barnard* v. *Henderson*, 514 F.2d 744 (CA 5, 1975).

In *Barnard*, a pistol was used in the murder. The unknown killer left the scene with the weapon. Subsequently, a pistol was located in Illinois which had there been sold by the defendant. Ballistic tests identified the slug found in the victim as having been fired by that pistol.

In *Barnard*, the issue thus was whether a pistol, identified as the defendant's and in his possession after the shooting, had fired the fatal bullet. Due process fair-trial requirements were held to have been violated by the denial, upon request, of pre-trial access for purpose of completing difficult ballistic testing.

In the recent case, however, the ballistic testing is not shown to have been useful for the accused's defense. The accused's defense did not deny that the pistol found in the alley nearby the shooting had fired the fatal shot. His contention, rather, was that he himself had no connection with the pistol which had been so used.

We are unwilling to reverse a conviction because of the denial of opportunity for pre-trial ballistic testing where, under the circumstances of the actual case, such ballistic testing is not shown to have been relevant to any issue of the accused's defense. Even if it were error to have denied the pre-trial testing to the defendant, the denial is not claimed nor shown to have caused him any prejudice in the preparation of his defense under the particular issues of the present prosecution.

Assignment 17: Voir dire examination of prospective jurors as to their attitudes on the death penalty

La.C.Cr.P. art. 798(2) (1968) provides that the State may challenge for cause any prospective juror in a capital case who "makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt."

Before the 1968 amendment so limiting the state's right to challenge for cause, the State had been entitled to challenge for cause additionally any prospective juror in a capital case who merely had "conscientious scruples against the infliction of capital punishment." La.C.Cr.P. art. 798(2) (1966). The United States Supreme Court had previously held that exclusion of jurors with merely conscientious scruples against capital punishment deprived an accused in a capital case of the jury representative of the community to which he is constitutionally entitled. *Witherspoon* v. *Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

In the instant case, the trial court sustained the State's challenges for cause as against twenty-five veniremen who expressed fixed opposition to imposition of the death penalty under any circumstances.

[4] The defendant contends that two of them (Halphen and Blazio) did not make their opposition to the death penalty unmistakably clear, so as to entitle the State to challenge them for cause. However, we have reviewed their voir dire examinations and find no error in the trial court's determination that, despite some initial ambiguity, the ultimate firm conclusion of the respective veniremen was that they would not impose the death penalty in the instant case under any circumstances.

[5] Additionally, the defendant argues that the removal from a jury service of twenty-five veniremen opposed to the death penalty deprived him of the jury

representative of the people to which an accused is constitutionally entitled. He points out that, under rulings of this court, a jury is not concerned with the penalty imposed for a conviction but only with whether the facts it finds proved to fit the statutory definition of the crime for which convicted. *State* v. *Selman*, 300 So.2d 467 (La.1974); *State* v. *Blackwell*, 298 So.2d 798 (La.1974). Thus, he contends, to permit challenge for cause of a venireman because of his views about a statutory penalty is arbitrarily to exclude him from the trial jury for no reason related to his function as a juror.

Nevertheless, despite these persuasively-urged contentions, by La.C.Cr.P. art. 798(2) our legislature has permitted exclusion for cause of those prospective jurors who will under no circumstances impose a death penalty mandatorily required when an accused is found guilty of the criminal conduct with which charged.[1]

In *Witherspoon*, the United States Supreme Court recognized that there is no constitutional bar to excluding from jury service those who will in no circumstances concur in a verdict of guilt because of their refusal to apply the extreme penalty required by statute upon conviction.

We do not find error presented by this assignment.

Other Errors Assigned

The other assignments of error are clearly without merit.

For the most part, they concern evidentiary rulings patently correct: Assignment 1 (question at pre-trial motion properly held irrelevant); Assignment 3 (question at pre-trial hearing properly held not to call for a legal conclusion); Assignment 6 (qualified medical expert properly held competent to testify concerning the path of the bullet through the victim's body); Assignments 7, 8, 9 (blood, firearms, and fingerprint witnesses

[1] Further, as perhaps recognized by this statute, in capital cases the jury has been charged as to the capital consequences of its verdict, and counsel have been permitted to argue this extreme penalty. No decision of this court has intimated that this is not appropriate.

properly held qualified as experts); Assignment 10 (coroner's report and proces verbal properly held admissible); Assignment 11 (physical evidence and photographs admitted after proper foundation; defendant assigns no reason to the contrary); and Assignment 14 (miscellaneous rulings sustaining or overruling objections to four minor evidentiary matters correctly admitted or denied admissibility).

The motion for a directed verdict also was properly denied (Assignment 12). Among other reasons, the state's eyewitness testimony identified the defendant as the killer of the police officer.

Likewise, no merit is possessed by the assignments attacking certain trial court's rulings on constitutional grounds:

[6] *Assignments 2 and 5 (Motion to suppress identification)*: Officer Tobin, who was shot at almost point-blank range, identified the defendant as the man who had shot both him and the decedent. The police witness is shown to have had full opportunity to observe and identify his attacker.

The motion to suppress his identification as tainted is based upon the chance passing at Charity Hospital emergency room of the two wounded men, Officer Tobin and the defendant Roberts. When the policeman saw the other, he at once remarked, "That's the man who shot me. I'll never forget his face."

No showing whatsoever is made that the face-to-face encounter at the hospital was pre-arranged or that it in any way was intended or did influence the officer's ability to identify Roberts as his assailant, which was independently based on their actual encounter at the time of the shooting.

[7] *Assignment 4 (Motion to suppress revolver)*: The revolver used in the shooting was found in an alley. It was just outside the house in which the defendant had taken refuge after the shooting incident.

The motion to suppress the weapon is based on the contention that it was seized as the product of a warrantless search in the absence of probable cause. For many reasons, the motion is without merit, including: The

police officers looking for the wounded perpetrator of a murder committed minutes before, were entitled to follow a bloody residue into an alley within a block of the murder and to pick up an abandoned pistol in plain view in the alley. See, e.g., *State* v. *Nine*, 315 So.2d 667 (La.1975).

[8] *Assignment 16 (Motion to quash on grounds of unconstitutionality)*: We have rejected similar attacks upon the constitutionality of the death penalty provided for first degree murder, La.R.S. 14:30, as enacted by Act 109 of 1973. See, e.g., *State* v. *Hill*, 297 So.2d 660 (La.1974).

Decree

For the reasons assigned, we affirm the conviction and death penalty.

AFFIRMED.

SUMMERS, J., concurs and assigns reasons.

CALOGERO, J., concurs, having reservations as to the majority's treatment of bill No. 13.

DIXON, J., dissents from the ruling on the constitutionality of the death penalty under United States Supreme Court standards, but otherwise subscribes fully to the opinion.

SUMMERS, Justice (concurring).

I concur in the result of this opinion because I cannot approve the rejection of a number of contentions by the Court when no reasons are assigned therefor in this death penalty case.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 76-5206

HARRY ROBERTS, PETITIONER

v.

LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the State of Louisiana.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 8, 1976

SUPREME COURT OF THE UNITED STATES

No. 76-5206

HARRY ROBERTS, PETITIONER

v.

LOUISIANA

ON WRIT OF CERTIORARI to the Supreme Court of the State of Louisiana.

The petition for a writ of certiorari having been granted on November 8, 1976, the grant is hereby limited to the following question:

> "Whether the imposition and carrying out of the sentence of death for the crime of first-degree murder of a police officer under the law of Louisiana violates the Eighth and Fourteenth Amendments to the Constitution of the United States."

November 29, 1976

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 76-5206

HARRY ROBERTS

V.

STATE OF LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

OPPOSITION OF STATE OF LOUISIANA, RESPONDENT

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HARRY F. CONNICK,
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LOUISE KORNS,
ASSISTANT DISTRICT ATTORNEY
FOR THE PARISH OF ORLEANS

IN THE

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V.

STATE OF LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

OPPOSITION OF STATE OF LOUISIANA, RESPONDENT

STATEMENT OF THE CASE

Shortly after 6:30 p.m. on Mardi Gras day, 1974, Officers John Tobin and Dennis McInerney of the New Orleans Police Department, who were assigned to patrol and answer radio signals in car 504, received a radio signal of a shooting at 1628 Pauger Street in New Orleans, and at once drove toward that address. When they arrived at the corner of Pauger and Burgundy they were flagged down by Mrs. Theresa Dorsey, who gave them a description of the person they were looking for (beige jacket, blue jeans, green shirt, and red bandana with knot tied in the back), and who pointed in the direction in which the criminal was fleeing. Proceeding in the direction indicated, Officers Tobin and McInerney came upon Harry Roberts at the corner of Kerlerec and Burgundy. The accused was just turning the corner

and was removing a red bandana from his head. The officers drove after Roberts and finally caught up with him on Rampart Street between Kerlerec and Esplanade. They parked the police car, and as Officer Tobin got out of the vehicle he was shot in the leg and in the head by the accused. When Officer McInerney stepped out he was mortally wounded and fell to the ground, dying almost immediately. Although severely wounded, Officer Tobin managed to get out his service revolver and shoot Roberts in his left leg, whereupon the accused ran off and took refuge in the residence of Mrs. Mable Domingo at 914 Kerlerec, where he was captured by the police shortly thereafter. Tr. 1-36; 118-122.

The Grand Jury for the Parish of Orleans indicted Harry Roberts for the first degree murder of Dennis McInerney, a police officer. R. 21. The accused was tried, convicted, and sentenced to death. R. 1-22. He appealed to the Louisiana Supreme Court, which affirmed his conviction and sentence. State v. Roberts, 331 So.2d 11 (La. 1976). He is presently petitioning this Honorable Court for a Writ of Certiorari, urging three issues.

I.

Petitioner's first contention concerns the imposition on him of the death penalty. It appears that under this Court's decision in Stanislaus Roberts v. Louisiana, no. 75-5844, decided June 28, 1976, this sentence cannot be carried out unless, of course, this Court grants Louisiana's Application For Rehearing

and modifies its former holding.

II.

Petitioner's second contention objects to the failure of the trial court to order pretrial inspection of the murder weapon, a blue steel revolver, which was abandoned by Roberts in his flight and which was found by investigating officers lying on the ground in a rear alley near the Domingo residence, where Roberts had taken refuge.

The record which was filed in this case in the Louisiana Supreme Court, and to which counsel for petitioner makes frequent reference in his petition, does not contain the Motion For Oyer of the revolver and bullets in question, but the State concedes that it was filed and denied by the trial judge. However, counsel for petitioner, Mr. Garland Rolling, admitted during oral argument of this case in the Louisiana Supreme Court that after the trial court denied the motion the Assistant District Attorney in the case offered to permit the defense to inspect and test, before trial, the weapon and bullets in question, and that the defense did not accept this officer because the accused expressed no interest in such a procedure. Consequently the State of Louisiana believes that this second contention is moot, as the accused was not in fact denied pretrial inspection of these objects.

Alternatively, the State of Louisiana believes that for the reasons set out by the Louisiana Supreme Court in its

opinion herein the accused could in no way have been harmed by the denial of this motion--that is, the defense did not deny that the pistol found in the alley nearby the shooting had fired the fatal shot, but rather contended that Roberts had no connection with the weapon.

In the further alternative, the State of Louisiana respectfully submits that denial of pretrial inspection of evidence in a state criminal case does not present a substantial federal question unless the accused can show that there was no adequate opportunity for such inspection later during the trial itself, at the time the prosecution used or offered the evidence in question as part of its case. Thus, in the present case if Roberts had seriously doubted that the bullet which killed the police officer came from the gun in question, he could during the trial have asked to have the bullet inspected by his own expert, and this could have been done without undue delay of the trial by the simple expedient of having his expert present in court with a dual microscope. See State v. White, 321 So.2d 491 (La. 1975).

III.

Petitioner's third contention is that he was denied equal protection of the laws because the prosecutor asked him, while he was testifying before the jury, whether he had in 1970 plead guilty to theft and shoplifting in "case 144-714 'D' of Juvenile Court". Upon objection by defense counsel the trial

judge told the accused not to answer the question and instructed the jury to disregard it, but denied defense counsel's Motion For Mistrial. Tr. 335-336.

Thereafter, during further cross-examination by the prosecutor Roberts admitted that he was convicted in Municipal Court in 1973 for possession of stolen automobile tires, Tr. 336-337, and was convicted in Criminal District Court for possession of a stolen automobile, Tr. 337. These latter questions were permissible because under La. R.S. 15:495 evidence of conviction of crime is admissible for the purpose of impeaching the credibility of a witness, a practice which is prevalent in must jurisdictions and which has been recognized by this Court as serving a legitimate purpose. See Spencer v. Texas, 385 U.S. 554 (1967).

The State of Louisiana respectfully contends that although the trial court was technically correct in refusing to permit inquiry into Roberts' juvenile record because juvenile crimes are euphemistically viewed as "delinquency adjudications" and not as convictions, that the court's refusal to permit the question to be answered, and his direction to the jury to disregard the prosecutor's question cured any possible prejudice in view of the fact that Roberts then went on to testify that he was convicted in 1973 in Municipal Court for possession of a stolen car--that is, the jury in this proceeding heard through testimony which was admissible under La. R.S. 15:495 that the accused had a criminal record for theft, and therefore the prosecutor's question about his juvenile record for theft and shop-

lifting suggested nothing about Roberts which the jury did not subsequently learn from a valid source. Thus any error which may have occurred was harmless at most under Article 921 of the Louisiana Code of Criminal Procedure. Further, juvenile records are not sacrosanct. See, for example, Davis v. Alaska, 415 U.S. 308 (1974), in which this Court held that the accused should have been permitted to cross-examine a key prosecution witness concerning his juvenile record in order to impeach the witness' credibility.

CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to deny the Petition For Certiorari here being sought, or at most to limit any relief afforded petitioner to a ruling that under Stanislaus Roberts v. Louisiana the death penalty imposed on him cannot be carried out.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5206

HARRY ROBERTS,

Petitioner,

v.

LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Supreme Court of Louisiana affirming petitioner's conviction for first degree murder and the sentence of death is reported at – La. –, 331 So.2d 11 (1976). The oral opinion of the Criminal District Court for the Parish of Orleans finding the petitioner guilty and sentencing him to death is unreported, and appears in the Appendix.

JURISDICTION

The jurisdiction of this Court to hear this matter, if such jurisdiction exists at all, would be predicated upon 28 U.S.C. §1257(3), on the grounds that petitioner has asserted below and asserts here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Louisiana was entered on March 29, 1976, rehearing refused, May 14, 1976. The petition for certiorari was filed on August 12, 1976, and was granted on November 8, 1976. The grant of certiorari was limited to one question by order of the Court on November 29, 1976.

QUESTION PRESENTED

Whether the imposition and execution of a mandatory sentence of death for the crime of the murder of a police officer under Louisiana law violates the Eighth or Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves the following provisions of the statutes of Louisiana.

La. Rev. Stat. Ann. §14:30 (1974). "*First degree murder.* First degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or

(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or peace officer who was engaged in the performance of his lawful duties; or

(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or

(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]

(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

For the purposes of paragraph (2) herein, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorneys' investigator.

Whoever commits the crime of first degree murder shall be punished by death."[1]

[1] In 1975, §14:30(1) was amended to add the crime of aggravated burglary as a predicate felony for first degree murder. Act No. 327, West's La. Sess. L. Serv. 1975, at 570-571.

In July of 1976, the Louisiana Legislature amended and reenacted §14:30, by Act 657, which reads, in its entirety, as follows:

> "*An Act to amend and reenact Part II of Title 14 of the Louisiana Revised Statutes of 1950, relative to homicide,*

(continued)

La. Rev. Stat. Ann. §14:30.1 (1974). "*Second degree murder.* Second degree murder is the killing of a human being:

(footnote continued from preceding page)

by amending and reenacting Sections 30 and 30.1 thereof, to redefine the crimes of first degree murder and second degree murder and otherwise to provide with respect thereto.

BE IT ENACTED BY THE LEGISLATURE OF LOUISIANA:

Section 1. Section 30 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§30. First degree murder

First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation or suspension of sentence in accordance with the recommendation of the jury.

Section 2. Section 30.1 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby amended and reenacted to read as follows:

§30.1 Second degree murder

Second degree murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.

Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation, or suspension of sentence for a period of forty years.

Section 3. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.

Section 4. All laws or parts of laws in conflict herewith are hereby repealed.

Approved Aug. 5, 1976." West's La. Sess. L. Serv. 1976, at 1323.

(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

(2) When the offender is engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill.

Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation or suspension of sentence for a period of twenty years."[2]

La. Rev. Stat. Ann. §14:31 (1974). "*Manslaughter.* Manslaughter is:

(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood had actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or

(2) A homicide committed, without any intent to cause death or great bodily harm.

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or

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[2] In 1975, §14:30.1 was amended to increase the period of parole ineligibility from twenty to forty years following a conviction for second degree murder. Act No. 380, West's La. Sess. L. Serv. 1975, at 665.

In July 1976, §14:30.1 was amended and reenacted to redefine the crime of second degree murder. See note 1, *supra*.

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1.

Whoever commits manslaughter shall be imprisoned at hard labor for not more than twenty-one years."

La. Rev. Stat. Ann. §15:567 (1967). "*Conditions precedent to execution; warrant of governor.*

No person sentenced to death shall be executed until a certified copy of the indictment, verdict and sentence shall have been sent to the governor, and a warrant shall have been issued by him, under the seal of the state, directed to the warden of the Louisiana State Penitentiary at Angola, commanding the warden to cause the execution to be done on the person so condemned in all things according to the judgment against him, and upon the date named in said warrant."

La. Rev. Stat. Ann. §15:568 (1975 Supp.) "*Execution of death sentence; prior confinement of offender.*

The director of the Department of Corrections, or a competent person selected by him, shall execute the offender in conformity with the death warrant issued in the case. Until the time of his execution, the Department of Corrections shall incarcerate the offender in a manner affording maximum protection to the general public, and employees of the department, and the security of the institution."

La. Rev. Stat. Ann. §15:569 (1967). "*Place for execution of death sentence; manner of execution.*

Every sentence of death imposed in this state shall be by electrocution; that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person

convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room."

La. Rev. Stat. Ann. §15:570 (1975 Supp.). "*Officials and witnesses present at execution; minors excluded.*

Every execution of the death sentence shall take place in the presence of the warden of the Louisiana State Penitentiary at Angola, or a competent person selected by him, the coroner of the parish of West Feliciana, or his deputy, and a physician summoned by the warden of the Louisiana State Penitentiary at Angola, the operator of the electric chair who shall be a competent electrician who shall have not been previously convicted of a felony, a priest or minister of the gospel, if the convict so requests it, and not less than five nor more than seven other witnesses, all citizens of the State of Louisiana; no person under the age of eighteen years shall be allowed within said execution room during the time of execution."

La. Code Crim. Proc. Ann., art. 598 (1976 Supp.). "*Effect of verdict of lesser offense.*

When a person is found guilty of a lesser degree of the offense charged the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial."

La. Code Crim. Proc. Ann., art. 803 (1967). "*Same [General charge; scope]; charge as to included minor offenses and plea of insanity.*

When a count in an indictment sets out an offense which includes other offenses of which the

accused could be found guilty under the provisions of Article 814 or 815, the court shall charge the jury as to the law applicable to each offense . . ."

La. Code Crim. Proc. Ann., art. 809 (1967). "*Judge to give jury written list of responsive verdicts.*

After charging the jury, the judge shall give the jury a written list of the verdicts responsive to each offense charged, with each separately stated. The list shall be taken into the jury room for use by the jury during its deliberation."

La. Code Crim. Proc. Ann., art. 814 (1976 Supp.). "*Responsive verdicts; in particular.*

A. The only responsive verdicts which may be rendered where the indictment charges the following offenses are:

1. First Degree Murder:
   Guilty.
   Guilty of second degree murder.
   Guilty of manslaughter.
   Not guilty . . ."

La. Code Crim. Proc. Ann., art. 817 (1976 Supp.). "*Qualifying verdicts.*

Any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."[3]

[3] In July of 1976, the Louisiana Legislature enacted several new articles of the Code of Criminal Procedure to provide for sentence determination in capital cases. Act 694 of 1976, which enacted these articles, reads in its entirety as follows:

"An Act to amend Title XXX of the Louisiana Code of Criminal Procedure by adding thereto a new chapter, to be designated as Chapter 3 thereof, to be composed of Articles 905 through 905.9 thereof, both inclusive, to provide with respect to sentences and sentencing procedures in capital cases, including provisions to provide that a sentence of death may be imposed only after a sentencing hearing by the jury which determined guilt; to provide with respect to rules of evidence and procedure for

(continued)

STATEMENT OF THE CASE

The petitioner was sentenced to death on September 18, 1974, in the Criminal District Court for the Parish

(footnote continued from preceding page)

such hearings; to provide that a sentence of death shall not be imposed unless the jury finds an aggravating circumstance and considers mitigating circumstances and unanimously recommends a sentence of death; to define aggravating circumstances and mitigating circumstances; to provide that the jury recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence if the jury unanimously finds the sentence of death inappropriate; to provide the form for jury recommendations; to require that the court sentence the defendant in accordance with the recommendation of the jury and that the court impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence if the jury cannot unanimously agree on a recommendation; to provide for review of a sentence of death on appeal; and otherwise to provide with respect thereto.

BE IT ENACTED BY THE LEGISLATURE OF LOUISIANA:

Section 1. Chapter 3 of Title XXX of the Louisiana Code of Criminal Procedure, to be composed of Articles 905 through 905.9 thereof, both inclusive, is hereby enacted to read as follows:

CHAPTER 3. SENTENCING IN CAPITAL CASES

Art. 905. Capital cases; sentencing hearing required

Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein.

Art. 905.1 Sentencing hearing jury; commencement

The sentencing hearing shall be conducted before the same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.

Art. 905.2 Sentencing hearing; procedure and evidence

The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of

(continued)

of Orleans, New Orleans, Louisiana, after having been convicted of one count of first degree murder.

(footnote continued from preceding page)

whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Art. 905.3 Sentence of death; jury findings

A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

Art. 905.4 Aggravating circumstances

The following shall be considered aggravating circumstances:

(a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery;

(b) The victim was a fireman or peace officer engaged in his lawful duties;

(c) The offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping;

(d) The offender knowingly created a risk of death or great bodily harm to more than one person;

(e) The offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) The offense was committed in an especially heinous, atrocious or cruel manner.

Art. 905.5 Mitigating circumstances

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(continued)

At trial, the State's evidence showed that on February 26, 1974, at approximately 6:20 p.m., a neighborhood argument erupted in the vicinity of 1620 Pauger

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(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance.

Art. 905.6 Jury; unanimous recommendation

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Art. 905.7 Form of recommendations

The form of jury recommendation shall be as follows:

"Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

/s/ _____

Foreman"

or

"The jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole, or suspension of sentence.

/s/ _____

Foreman"

Art. 905.8 Imposition of sentence

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall

(continued)

Street in the city of New Orleans. A young black man identified as being the petitioner pulled a pistol and fired approximately three shots. *Trial*, p. 4.[4] The subject then ran off down the street and around a corner. During the course of the disturbance, a child was allegedly injured by the gunfire. Neighbors then called the police to report the disturbance. *Tr.*, p. 4.

A police car of the New Orleans Police Department, with two officers, Officer John Tobin and Officer Dennis McInerney, arrived on the scene about 6:40 p.m. *Tr.*, p. 26. Persons on the scene indicated to the officers the direction in which the subject went, and the officers gave pursuit, locating the subject as he turned a nearby corner. *Tr.*, p. 27. The officers followed the subject with their emergency lights flashing up a one-way street and then around a corner to

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(footnote continued from preceding page)

impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence.

Art. 905.9 Review on appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Approved Aug. 5, 1976. West's La. Sess. L. Serv. 1976, at 1375-1377.

[4]The pagination of the record herein is erratic. The citations herein refer to the Trial Transcript, contained in Volumes II and III, with page 1 of that transcript beginning at the commencement of the trial.

South Rampart Street. There the officers pulled the police car up onto the sidewalk in front of the subject. The subject then ran over to the door on the passenger side of the police car and began shooting into the open window. *Tr.*, p. 29. Officer Tobin was hit in the leg and head. Officer McInerney, who was driving the car, stepped out of the car and in doing so, was struck in the face, sustaining a fatal injury. The subject then began to run off, while Officer Tobin shot in his direction, hitting the subject in the left leg. *Tr.*, p. 30.

Officer Tobin, with the assistance of a bystander, then radioed for assistance. Additional officers arrived on the scene, and then reported to 914 Kerlerec Street in response to a police call. *Tr.*, p. 142. This call went out at 6:41 p.m. *Tr.*, p. 133. Officers arriving at the Kerlerec address (which is about four blocks from the scene of the fatal shooting) noticed a trail of blood in front of the house at 914 Kerlerec Street. *Tr.*, p. 145. The officers followed the trail down an alleyway beside the house at 914 Kerlerec Street, in which they discovered the alleged murder weapon. *Tr.*, p. 156. The officers continued to follow the blood trail over two fences, to the rear of 918 Kerlerec Street, two houses down. The officers then found blood smears on the side door of the 918 Kerlerec residence. *Tr.*, p. 145.

Upon entering the residence at 918 Kerlerec Street, the officers noticed the defendant tending to an apparent leg wound. After a scuffle, the officers succeeded in taking the defendant into custody. *Tr.*, p. 147-148. The defendant was taken to Charity Hospital for treatment of the leg wound. While the defendant was in police custody in the emergency room at the hospital, Officer Tobin who was also there for emergency treatment identified the defendant as being the man who shot him. *Tr.*, p. 445-446.

The defendant, at trial, took the stand in his defense and testified that there was an argument at the Pauger Street location, and that in the course of the argument, a neighbor threatened to shoot him. *Tr.*, p. 287-288. He testified further that he then left the scene and began to walk to work. As he was doing so, at a point about two blocks from the scene of the fatal shooting, and also two blocks from the scene of the initial argument, he was shot in the leg from the rear by an unknown assailant. The defendant then sought refuge in the home at 918 Kerlerec Street. *Tr.*, p. 290. The defendant called his mother to come to get him, and also called the operator to request police assistance. *Tr.*, pp. 294-295.

Shortly afterward, the defendant testified, the officers entered the house and arrested him, and took him to Charity Hospital.

While at the hospital, the defendant testified, the police officers rolled Officer Tobin next to him, and that the officers indicated to Officer Tobin that the defendant was the person who shot him. *Tr.*, p. 307-308.

At the trial, the murder weapon was introduced in evidence. Two fingerprints had been successfully lifted from the pistol, and the fingerprints were identified as being those of the defendant. *Tr.*, p. 240, 244. The defendant testified that sample prints were forcibly taken from him during police interrogation. *Tr.*, p. 310-312.

The defendant was found guilty of first degree murder on August 16, 1974, by a jury composed of eleven white men and one black man. The petitioner is black, and at the time of his conviction and sentence, was nineteen years old.

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW

On appeal to the Supreme Court of Louisiana, petitioner's Assignment of Error No. 16 asserted that "the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments; and R.S. 14:30 is unconstitutional, in that the jury is empowered to return a responsive verdict to a lesser included offense, which does not carry the death penalty."

The petitioner's case arose and was decided by the courts of Louisiana after the decision of *Furman v. Georgia*, 408 U.S. 238 (1972), and before the recent case of *Roberts v. Louisiana*, ____ U.S. ____, No. 75-5844, July 2, 1976. The statute under which petitioner was tried—La.R.S. 14:30—was amended and reenacted after *Furman*, to provide for mandatory death sentences to control the amount of discretion in sentencing vested in the jury which was disapproved by this Court in *Furman*. For this reason, petitioner's attack on the constitutionality of his death sentence was partially premised on the contention that the mandatory sentencing procedure still allowed pre-*Furman* discretion.

Petitioner's case on appeal to the Supreme Court of Louisiana was not the first case to challenge the constitutionality of La.R.S. 14:30 in that court. The question was first decided by the Supreme Court of Louisiana in *State v. Hill*, 297 So.2d 660 (La. 1974), and that decision was later affirmed in *State v. Roberts*, 319 So.2d 317 (La. 1975) and *State v. Washington*, 321 So.2d 763 (La. 1975).

With one justice dissenting as to the constitutionality of the mandatory death sentence, the Supreme Court of Louisiana affirmed petitioner's conviction and sentence, disposing of petitioner's attack on the constitutionality

of the sentence with a brief citation of decision in *State v. Hill*, supra, as being controlling. The Supreme Court of Louisiana did not decide the specific constitutionality of mandatory death sentences for the killing of police officers.

SUMMARY OF ARGUMENT

The mandatory sentence of death imposed upon the petitioner under the laws of Louisiana in existence at the time of the crime charged to petitioner is violative of the Eighth and Fourteenth Amendments in both procedure and substance. Additionally, this honorable Court lacks jurisdiction to consider the present question.

I.

There is no jurisdiction of this Court to hear the present question, for the reason that the Supreme Court of Louisiana has not rendered a final judgment—or even any judgment at all—on the specific question under consideration; that, alternatively, should jurisdiction be found to exist, this Court should decline to exercise such jurisdiction in order to allow the Supreme Court of Louisiana an opportunity to reconsider this case in light of intervening decisions; that the State of Louisiana lacks standing to defend the imposition of the mandatory death herein; and that the case is not ripe for adjudication for the reason that an important decision by the Supreme Court of Louisiana regarding the State's standing herein has not yet been made.

II.

The mandatory death sentence for the crime of the murder of a police officer under former La.R.S.§14:30 is procedurally defective in that the said law and relevant sentencing procedures did not provide for any focus by the sentencing authority on the circumstances of the particular offense. The law is further defective in that it provided no focus upon the character or propensities of the petitioner. Louisiana's statutes allowing juries to return verdicts of guilty to lesser included offenses which do not carry the death penalty, coupled with a prior lack of meaningful sentence review, also renders petitioner's sentence unconstitutional.

III.

The death sentence imposed upon the petitioner is substantively defective in that mandatory death sentences have been historically repudiated by society's "evolving standards of decency."

INTRODUCTION

On July 2, 1976, in the case entitled *Roberts v. Louisiana*, ____ U.S. ____, No. 75-5844,[5] this honorable Court decided that the mandatory death sentence therein imposed under La.R.S. §14:30 violated the Eighth and Fourteenth Amendments. The death sentence in that case was vacated, and the case was

[5] Wherever used in this brief, the citation of *Roberts v. Louisiana*, or "the *Roberts* case," refers to *Roberts v. Louisiana*, ____ U.S. ____, No. 75-5844, July 2, 1976, and not to the petitioner's case.

remanded for further proceedings. The specific act constituting first degree murder in the *Roberts* case was found in Section (1) of La.R.S. §14:30:

> "Where the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . armed robbery . . ."

In the *Roberts* case, this Court upheld the constitutionality of the death penalty *per se*, but disapproved of its mandatory application under Louisiana law. The objection was apparently based upon two interrelated grounds: the historical repudiation of mandatory death sentences, and the lack of standards to guide the jury in the application of the sentence together with a lack of meaningful appellate review of the sentence imposed.

The Court's opinion, to many informed observers, apparently invalidated the mandatory death sentence of La.R.S. §14:30 entirely. The Louisiana Legislature then amended and reenacted the statute to do away with mandatory sentencing. The amended provided for a defined set of aggravating and mitigating circumstances to guide the jury in the application of the death sentence, and also provided for appellate sentence review.[6] Mandatory death sentences, as they had existed and were applied prior to the *Roberts* decision, were legislatively abolished following that decision.

In the *Roberts* decision, the Court noted the possible validity of a mandatory death sentence in the narrow circumstance of a murder by a person serving a life sentence, or by a person previously convicted of an unrelated murder.[7] The Court noted that such a statute

[6] The new laws are set forth in footnotes 1 and 3, *supra*, pp. 3-4 and 8-12.

[7] *Roberts v. Louisiana*, No. 75-5844, July 2, 1976, *slip op.*, p. 8, n. 9.

(dealing with these two particular offenses) "defines the capital crime at least in significant part in terms of the character or record of the individual offender." It was further noted that "[a] prisoner serving a life sentence presents a unique problem that may justify such a law."[8] However, since that particular question was not presented by the facts of the *Roberts* case, it was not reached for decision by the Court.

Following the decision of *Roberts v. Louisiana*, *supra*, several Louisiana capital cases pending on petitions for certiorari were vacated and remanded, among these being the case of *Washington v. Louisiana*, ____ U.S. ____, No. 75-6123, July 6, 1976. The petitioner, Johnson Washington, was convicted under La.R.S. §14:30 of the first degree murder of a deputy sheriff.[9]

Understanding the reversal of sentence in *Washington* to be based upon the constitutional defects identified in *Roberts*, and in light of the fact that petitioner was tried under the same law and procedure apparently condemned in *Roberts* and *Washington*, the petitioner presented his objections to the previously condemned Louisiana statutes in his petition for certiorari largely as a matter of form, in the full expectation that the mandatory death sentence in his case for the crime of the killing of a police officer would be vacated, since a similar sentence for a similar crime tried under the same

[8] Ibid.

[9] *State v. Washington*, 321 So.2d 763 (La. 1975).

laws was vacated by the Court in *Washington v. Louisiana*.[10] The narrow question selected by the Court for argument herein was not presented by the petitioner,[11] nor was that particular question raised by the State in its opposition to the petition for certiorari.[12]

Further, the Supreme Court of Louisiana has not had an opportunity to consider the narrow question now being decided.[13] That court has only considered the validity of the entire statute rather than the particular validity of a given part, such as the provisions concerning the murder of a police officer.

In its opinion in petitioner's appeal, the Supreme Court of Louisiana disposed of petitioner's constitutional attack on the mandatory death sentence thus:

> "We have rejected similar attacks upon the constitutionality of the death penalty provided for first degree murder, La.R.S. 14:30, as enacted by Act 109 of 1973. See, e.g., *State v. Hill*, 297 So.2d 660 (La. 1974)."[14]

[10]On remand from this Court, the Supreme Court of Louisiana reconsidered the mandatory death sentence imposed upon Johnson Washington, and by per curiam of November 30, 1976, remanded that case to the trial court for the resentencing of Washington to life imprisonment. *State v. Washington*, ____ So.2d ____, No. 55,806 (La. Nov. 30, 1976). Thereafter, the State filed an application for rehearing in the case on December 1, 1976, citing this Court's action in petitioner's case as reason for the rehearing. *State v. Washington, supra, State's Application for Rehearing*, filed December 1, 1976. As of the date of the filing of this brief, no action on the rehearing application has been taken.

[11]See *Petition for Certiorari* herein, p. 13.

[12]"It appears that under this Court's decision in *Stanislaus Roberts v. Louisiana*, . . . this sentence cannot be carried out unless, of course, this Court grants Louisiana's Application for Rehearing and modifies its former holding." *Opposition of State of Louisiana, Respondent*, pp. 2-3.

[13]The State's Application for Rehearing in *State v. Washington, supra*, n. 10, has not been acted upon.

[14]331 So.2d 11, at 16.

In all of its considerations of the mandatory death penalty to date, the Supreme Court of Louisiana has considered only the validity of La.R.S. §14:30 as a whole, and has never ruled on the particular validity of a mandatory death sentence for one of the specific acts constituting first degree murder thereunder.

I.

JURISDICTION

In past decisions, this Court has consistently declined to decide questions which were not the subject of a final decision of the highest court of a state, when a law of a state is at issue.[15] 28 U.S.C. §1257 statutorily embodies this requirement of finality.

The question presently under review involves the constitutionality of a mandatory death sentence for the crime of the murder of a police officer. Petitioner received such a sentence, under the provisions of La.R.S. §14:30.[16] In petitioner's appeal to the Supreme Court of Louisiana, petitioner objected to the constitutionality of the mandatory death penalty *per se*, as well as to its procedural application in Louisiana.[17] The

[15]*Radio Station WOW v. Johnson*, 326 U.S. 120 (1945); *Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co. Inc.*, 344 U.S. 178 (1952). See also the discussion of finality in an injunction case, *Local No. 438 Const. & General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542 (1963), wherein the state judgment was final "since there was nothing more of substance to be decided in the trial court." This case is in striking counterpoint to petitioner's case, since here the very essence of the present question has never been considered by the state courts.

[16]La.R.S. §14:30 was amended and reenacted in July, 1976. See footnote 1, *supra*.

[17]*State v. Roberts*, No. 56,952, *First Supplemental Brief of Defendant-Appellant*, p. 7.

petitioner's arguments were not narrow to focus on the constitutionality of a mandatory death sentence for the particular crime with which he was charged—the murder of a police officer.[18] The state Supreme Court's approval of mandatory death sentences in the general application necessarily involved an approval of a particular application, and upon their decision that mandatory death sentences are generally valid, there was no need for that court to examine the particular validity of such a sentence for a specific class of murder. Indeed, an examination of the particular validity of a mandatory death sentence for a specific class of first degree murder, when the prohibition of such a murder is grouped together with other classes of murder in a single statute, must necessarily be predicated upon the grounds of some defect in the use of such sentences as a whole for all the acts covered by the single statute, such as the examination of a given statutory clause to determine if it is severable from an otherwise invalid statute. Since the Supreme Court of Louisiana found no such general defect in La.R.S. §14:30, that court had no reason to examine the particular validity of mandatory death sentences for those convicted of the murder of police officers.

The Supreme Court of Louisiana found petitioner's challenge of the constitutionality of his sentence to be "clearly without merit,"[19] and disposed of the challenge

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[18]Similarly, in *State v. Roberts*, 319 So.2d 317 (La. 1975), decided here *sub nom Roberts v. Louisiana*, ____ U.S. ____, No. 75-5844, July 2, 1976, the Supreme Court of Louisiana decided the constitutionality of the death sentence in all applications, and not for the specific act therein involved, i.e., a murder in the course of an armed robbery.

[19]331 So.2d 11, at 15.

in one sentence.[20] Petitioner's appeal was the second mandatory death penalty case considered by that court which involved the murder of a "peace officer,"[21] and neither opinion dealt with the specific constitutionality of a mandatory death sentence for the particular crime involved.

Petitioner's appeal was decided and rehearing thereon was refused by the Supreme Court of Louisiana prior to this Court's decision in *Roberts v. Louisiana, supra*, and the state Supreme Court has not had an opportunity to reconsider the particular validity of a mandatory death sentence in petitioner's case, in light of the intervening decision in *Roberts*.

It is clear that the present question here under review has *not* been ruled upon by a lower state court in petitioner's case, or even in any other Louisiana case.[22] This Court has consistently held that if an issue was not presented to state courts in such a manner that it was

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[20]"We have rejected similar attacks upon the constitutionality of the death penalty provided for first degree murder, La.R.S. 14:30, as enacted by Act 109 of 1973." 331 So.2d, at 16. This summary rejection of petitioner's claim without elaboration provoked a separate concurrence by Associate Justice Summers. See 331 So.2d, at 16.

[21]La.R.S. §14:30(2) defined as first degree murder carrying a mandatory death penalty the case of the killing of a human being "when the offender has a specific intent to kill or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties." The first case involving the murder of a "peace officer" (therein, a deputy sheriff), was *State v. Washington*, 319 So.2d 763 (La. 1975); *on writ, rev'd*, ____ U.S. ____, No. 75-6123, July 6, 1976.

[22]The other Louisiana case involving the murder of a peace officer, *Washington v. Louisiana, supra*, footnote 10, is still pending on the State's application for rehearing in the Supreme Court of Louisiana as of the date of the filing of this brief.

necessarily decided below, the Court would have no power to consider the issue. *Street v. New York*, 394 U.S. 576 (1969); *Hill v. California*, 401 U.S. 797 (1971); *Monks v. New Jersey*, 398 U.S. 71 (1970); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). The only distinguishing feature between the cited cases and that of the petitioner is that in the cited cases, the issues were raised for the first time on certiorari by the petitioner, whereas in the present case, the issue under consideration was raised by the Court *sua sponte*. Nevertheless, the rule of no review where the issue was not raised below should not be made dependent on the method in which the issue is presented to the Court: the determinative fact is the lack of lower court decision, and not the mode of presentation of the issue. The fact is inescapable that the Supreme Court of Louisiana has not decided the question, and for this reason, under past decisions of this Court, there is no power to decide the present issue.

Particularly interesting and possibly applicable here is this Court's actions in two sets of cases, both of which involved the lack of state review of cases following the decision by this Court if issues affecting the said cases. The first set involved *Norris v. Alabama*, 294 U.S. 587 (1935), and *Patterson v. Alabama*, 294 U.S. 600 (1935). In *Norris*, a jury make-up was found to be defective by the Court, and the case was remanded. In *Patterson*, the companion case to *Norris*, the defendant had failed to reserve the error of jury make-up, and the Alabama court refused to consider the claim on appeal. Nonetheless, this Court reversed *Patterson* as well and remanded the case, believing that the state court might have viewed Patterson's claim differently had it known that the constitutional objection was valid. The *Norris* case was found in *Patterson* to have intervened between the decision of Patterson's case on appeal and its later

consideration on certiorari. The remand was ordered to that the Alabama court could take cognizance of the intervening *Norris* decision. The action in Patterson is consonant with the rule previously discussed of the abstention of deciding issues not decided in state court. In *Patterson*, though the failure of the state court to consider Patterson's claim would not operate as a bar to review on certiorari,[23] the Court decided to permit Alabama's courts a chance to pass upon the issue.

The *Patterson* principle was followed in *Williams v. Georgia*, 349 U.S. 375 (1955). In *Williams*, another jury selection process was involved which was condemned by this Court in *Avery v. Georgia*, 345 U.S. 559 (1953). *Avery* was decided two months after Williams' trial. The Georgia Supreme Court refused to consider Williams' objections founded upon the *Avery* decision, despite the fact that both cases arose and were tried in the same county and under the same condemned procedure, on the procedural grounds of Williams' failure to make timely objection to the jury make-up. Since Williams' case did not, like *Patterson*, involve a decision by this Court which *followed* state appellate determination, the Court found that it had jurisdiction, but nonetheless *declined* to exercise the jurisdiction until Georgia had a chance to decide the question. *Williams* was therefore reversed and remanded for the consideration of the federal question.

The *Patterson* principle is particularly applicable here, even more so than in *Williams*, since here, unlike *Williams*, a decision by this Court crucial to the issue intervened between state appellate determination and consideration on certiorari. *Roberts v. Louisiana, supra,*

[23] See *Henry v. Mississippi*, 379 U.S. 443 (1965), wherein the Court held that state procedural rules, specifically those which bar appellate consideration of errors unreserved at trial, are not to be allowed to bar vindication of important federal rights.

was reversed and remanded due, among other things, to a defect in Louisiana's responsive verdict scheme.[24] Just as *Patterson* was tried under the same defective procedure as *Norris*, so was the petitioner tried under the same responsive verdict scheme disapproved by the Court in *Roberts*. Further, as in *Patterson*, the state court did not consider the *Norris* defect in Patterson's state appeal, so has the Supreme Court of Louisiana failed to consider petitioner's sentence in light of the procedural defects identified in *Roberts*. Since the Louisiana Supreme Court has not had an opportunity to reconsider its ruling in petitioner's case in light of this Court's decision in *Roberts v. Louisiana*, this case, like *Patterson*, should be remanded for consideration in light of the intervening decision.

A further objection to the Court's consideration of this matter involves a question of standing, as well as a question of the ripeness of the issues which would allow a determination of standing. The standing problem here is essentially whether the State of Louisiana, by virtue of the recent acts of its Legislature, has any standing whatsoever to defend the imposition of the mandatory death sentence upon the petitioner.

An examination of the legislative history of La.R.S. §14:30 is essential to a clear understanding of the standing problem. Prior to this Court's decision in *Furman v. Georgia, supra,* Louisiana had no distinction between first and second degree murder, and encompassed all killings involving specific intent as well as certain felony murders.[25] La.R.S. §14:30 prior to *Furman* provided only for a death sentence upon conviction; however, La. Code Crim. Proc. Art. 817 allowed for jury qualification of its verdict as "Guilty

[24] *Roberts v. Louisiana, supra, slip op.*, pp. 8-9.

[25] La. Acts 1942, No. 43, §1, Art. 30.

without capital punishment."[26] Accordingly, all persons convicted of murder were sentenced either to death or to life imprisonment, at the unguided decision of the jury. In obvious response to the *Furman* decision, the Louisiana Legislature amended and reenacted La.R.S. §14:30, and enacted La.R.S. §14:30.1 to provide for first and second degree murder, providing that conviction of first degree murder would carry a mandatory death sentence, and taking away the jury's power to qualify the verdict. The legislative Act which accomplished this change included therein as Section 2 the following provision:

> "This Act shall not apply to any crime committed before the effective date of this Act. Crimes committed before that time shall be governed by the law existing at the time the crime was committed."[27]

Act 109 became effective on July 2, 1973, and was in effect at the time petitioner's crime was allegedly committed.

In July 1976, in response to this Court's decision in *Roberts v. Louisiana, supra,* the Louisiana Legislature amended and reenacted La.R.S. §14:30 to eliminate the mandatory death sentences, and to make the imposition of the death sentence a matter of the trial jury's finding a statutorily defined aggravating circumstance.[28] The 1976 legislation, set forth in its entirety in footnotes 1 and 3, *supra*, contained no provision identical or even similar to Section 2 of Act 109 of 1973, quoted above. Section 2 is generally known as a "saving clause," which preserves criminal liability in the

[26] La. Code Crim. Proc. Ann, art. 817 (1967).

[27] La. Acts 1973, No. 109, §2.

[28] See footnotes 1 and 3, *supra.*

event of an express or implied repeal of an earlier criminal statute. Act 657 of 1976 has no such saving clause, such as Section 2 of Act 109 of 1973. Act 657 further provides that "all laws or parts of laws in conflict herewith are hereby repealed."[29] It is the earnest contention of the petitioner that La.R.S. §14:30 as it existed before the 1976 amendment is in conflict with the statute following the amendment; that due to this conflict, the two laws cannot co-exist; and the latter law has therefore *expressly* repealed the former. Due to the absence of a saving clause, there is no criminal liability now existing on the part of the petitioner as regards first degree murder. Act 657 of 1976 went into effect on or about October 2, 1976, after petitioner had filed his petition for certiorari. This is now the first time that petitioner has raised the issue of the lack of the standing clause; but it is here presented to the Court not for decision, but in the hope of showing that the standing of the State to defend the sentence imposed upon the petitioner is in serious question. The effect of a lack of a saving clause is essentially a matter of state law, but prior decisions of the Supreme Court of Louisiana, although not in cases involving such a serious penalty, have held that the lack of a saving clause releases criminal liability. See, e.g., *State v. Bienvenu*, 207 La. 859, 22 So.2d 196 (1945); *State v. Thomas*, 149 La. 654, 89 So. 887 (1921).

If Louisiana law does not provide for any continued criminal liability on the part of petitioner for the first degree murder, then certainly the State has no standing to insist upon such liability before this Court. But coupled with this lack of standing is the problem of

[29]West's La. Sess. L. Serv. 1976, p. 1323.

ripeness of the standing issue for adjudication. Since the effect of a lack of a saving clause is largely a matter of state law,[30] the Supreme Court of Louisiana should be first given the chance to determine what effect the 1976 legislation had upon prior criminal liability. A decision of the effect of the legislation by this Court which upholds criminal liability, prior to the decision of that question by the Supreme Court of Louisiana, may render the ultimate decision reached in this case an advisory opinion, in the event that the Louisiana Supreme Court finds no continuing criminal liability as a matter of state law. For this reason, there is an issue herein which has not been decided below, and which may make the decision of the ultimate issue herein an advisory opinion.

Here are presented two objections to this Court proceeding toward a disposition on the merits herein: the doctrine of declining to decide issues not passed upon below (previously discussed herein), and the doctrine of abstention from the decision of federal questions where the case may be disposed of on questions of state law. Bearing in mind that a decision by this Court on the merits may be displaced by a decision of the Louisiana Supreme Court against continuing criminal liability, the wisdom of the abstention doctrine enunciated by a unanimous Court in *Texas v. Pullman Co.*, 312 U.S. 496 (1941) becomes clear:

> "In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication." 312 U.S., at 500.

[30]Petitioner does not discount the possibility that a federal question may arise in the course of the Louisiana Supreme Court's determination of the issue.

Since the question presently being considered was not ever decided by the Supreme Court of Louisiana, the issue was not the subject of a final judgment of a state court, thereby precluding this Court from exercising jurisdiction under 28 U.S.C. §1257. Due to this lack of jurisdiction, the writ should be dismissed. Alternatively, should jurisdiction be found to exist, this case should be remanded to the Supreme Court of Louisiana to allow that court an opportunity to reconsider petitioner's case in light of the *Roberts* decision and the procedural defects noted therein by the Court. In the further alternative, the case should be remanded to the Supreme Court of Louisiana to allow that court a chance to pass upon the effect of a lack of a saving clause in the 1976 legislation, for the reason that the State's standing to defend the mandatory death sentence is now drawn into serious question, and that question should be resolved at the state level.

II.

PROCEDURAL OBJECTIONS TO LOUISIANA'S APPLICATION OF MANDATORY DEATH SENTENCES FOR THE MURDER OF A POLICE OFFICER.

The question under consideration cannot be divorced from its procedural application and considered solely in the abstract: for this Court to consider the intrinsic constitutionality of Louisiana's mandatory death sentence for a given class of first degree murder, there must be no statutory procedural defects sufficient to decide the case. In the presence of such a defect, there would be no reason to reach the issue of the inherent constitutionality of the mandatory death sentence, and any discussion of the ultimate issue after a disposition

on procedural grounds would be merely an advisory opinion.

This Court has consistently adhered to the policy of avoiding the decision of unnecessary constitutional questions. This policy was articulated in Justice Brandeis' concurrence in *Ashwander v. TVA*, 297 U.S. 288, at 346-348 (1936), and has been consistently followed since.[31]

A recent instance of the application of the *Ashwander* doctrine may be found in *Furman v. Georgia, supra.* There, three of the majority declined to reach the issue of the constitutionality *per se* of the death penalty, and limited the disposition of the case to procedural grounds. Of these three justices, Justice Stewart specifically cited the Brandeis concurrence in *Ashwander* as justification for declining to reach the ultimate question.

If this doctrine is to be applied in the petitioner's case, the existence here of a procedural flaw in the imposition of the mandatory death sentence would make a decision of the ultimate question unnecessary.

In *Roberts v. Louisiana, supra,* this Court did not conclude that mandatory death sentences were invalid in all applications;[32] rather, the Court found the mandatory death sentences under Louisiana law defective in application:

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[31] *Hillsborough v. Cromwell*, 326 U.S. 620, 629-630 (1946); *Dandridge v. Williams*, 397 U.S. 471, 475-476 (1970); *Hagans v. Lavine*, 415 U.S. 528, 549-550 (1974); *Mayor of City of Phila. v. Educational Equality League*, 415 U.S. 605, 629 (1974).

[32] See *Roberts v. Louisiana, supra, slip op.*, p. 8, n. 9, wherein the question of a mandatory death sentence for murder committed while serving a life sentence was not reached. See also, *Woodson v. North Carolina*, ____ U.S. ____, No. 75-5491, July 2, 1976, *slip op.*, pp. 5-6, n. 7, 10-11, n. 25.

> "The constitutional vice of mandatory death sentence statutes–lack of focus on the circumstances of the particular offense and the character and propensities of the offender–is not resolved by Louisiana's limitation of first-degree murder to various categories of killings." *Slip op.*, p. 7.

Left open by the Court was the narrow question of the validity of mandatory death sentences by those convicted of a previous unrelated murder, or by a person serving a life sentence.[33] The reason given for excluding this particular class of murder from the objections in *Roberts* was that the excepted category ". . . defines the capital crime at least in significant part in terms of the character or record of the individual offender,"[34] i.e., that this particular crime provided some significant focus on the character or record of the individual offender which was found lacking in the definitions of other first degree murders. The definition as first degree murder of murder by one previously convicted of an unrelated murder, and by one serving a life sentence, was contained in La.R.S. §14:30(3).

The provision of La.R.S. §14:30 which dealt with the murder of police officers was not singled out by the Court for exception from the *Roberts* decision. One might assume that the mandatory death sentence for the murder of a police officer was not excepted from the *Roberts* decision, as may be evidenced by this Court's action in reversing the sentence of one convicted of killing a deputy sheriff in *Washington v. Louisiana*, ____ U.S. ____, No. 75-6123, July 6, 1976; *reh'g den.*, October 4, 1976. In the *Washington* case, the petitioner therein was tried under the same clause of La.R.S. §14:30 as was the instant petitioner, and

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[33] *Roberts v. Louisiana, supra, slip op.*, p. 8, n. 9.

[34] Ibid.

the same procedural laws governing the trial of the cases were followed.[35]

Should the *Washington* case not be sufficient to indicate procedural flaws in Louisiana's imposition of mandatory death sentences upon persons convicted of the murder of police officers, a consideration of the statutory definition of such a crime will show that the definition does not meet the *Roberts* criterion of being defined "at least in significant part in terms of the character or record of the individual offender."[36]

The definition of murder involving a prisoner serving a life sentence, or involving a person previously convicted of an unrelated murder necessarily implies that the offender brought within the statutory definition has either committed a prior murder, or, at the very least, has been convicted of a serious offense. The statutory definition justly assumes a history of serious crime. For the State to prove its case under such a definition, proof must be offered of the prior offenses. Without such proof, a case for first degree murder could not be established and the offender could not be found guilty on the first degree murder charge which carries the death penalty. In other jurisdictions, this focus on the past record of the accused is one method of imposing the death sentence which was approved by this Court in *Gregg v. Georgia*, ____ U.S. ____, No. 74-6257, July 2, 1976, and *Proffitt v. Florida*, ____ U.S. ____, No.

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[35] See also *Green v. Oklahoma*, ____ U.S. ____, No. 75-6451, July 6, 1976, which also involved a mandatory death sentence for the killing of a police officer, in which the death sentence was also vacated, and the case remanded for further proceedings in light of *Roberts v. Louisiana* and *Woodson v. North Carolina, supra*, footnote 32.

[36] See footnote 33, *supra*.

75-5706, July 2, 1976.[37] In these jurisdictions, the focus on the record of the accused takes place in a special sentencing hearing, with the record of the accused possibly being used by the prosecution to show an "aggravating circumstance" warranting the imposition of the death sentence.

The focus implicit in the definition of murder committed by one serving a life sentence or of murder committed by one previously convicted of an unrelated murder was perhaps the reason for the Court's exception of such a class of murder from its objection in *Roberts* to Louisiana's mandatory death sentences, since such focus had proved sufficient in *Gregg* and *Proffitt*, although in the latter cases, the focus occurred in separate sentencing hearings.

[37]Ga. Code Ann., §26-3102 (1975 Supp.), provides that the sentence will be life imprisonment unless the jury at a separate evidentiary hearing immediately following the verdict finds unanimously and beyond a reasonable doubt that at least one statutory aggravating circumstance exists. §27-2534.1(b) includes as an aggravating circumstance the situation where the offense "was committed by a person with a prior record of conviction for a capital felony, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions."

In Florida, a similar evidentiary hearing is held to determine the existence of any aggravating circumstances. Fla. Stat. Ann. §921.141(6) (Supp. 1976-1977) provides as an aggravating circumstance the situations where "the capital felony was committed by a person under sentence of imprisonment," and "the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

Under present Louisiana law, La. Code Crim. Proc. Ann., art. 905.4(c) and (f) encompass as aggravating circumstances the situations of murder by one previously convicted of an unrelated murder, and murder by one serving a life sentence. See footnote 3, *supra*.

The instant question is whether the crime of the murder of a police officer may, consistent with the rationale of the footnoted exception in *Roberts*, be also excluded from the objections of *Roberts*. In the case of one serving a life sentence, it may be conclusively presumed that the accused has been previously convicted of a rather serious crime. It may not be so presumed that everyone convicted of the murder of a police officer has also been previously convicted of another serious crime: there is nothing whatsoever to preclude a person without a criminal record from committing the murder of a police officer as a first offense. This hypothetical situation may be unlikely, but it is not impossible.

The failure of La.R.S. §14:30(2) to address itself to the character or record of the offender, as does the footnoted exception in *Roberts*, then La.R.S. §14:30(2) must come within the objections noted in *Roberts* rather than within the exception.

However, the objections noted in *Roberts* extended beyond the failure of Louisiana's mandatory death sentence statute to focus on the character or propensities of the accused:

> "Louisiana's mandatory death sentence also fails to comply with *Furman's* requirement that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences." *Slip op.*, p. 8.

Louisiana had in effect at the time of petitioner's trial (as well as at the time of the trial of Stanislaus Roberts) a responsive verdict procedure which was found in *Roberts* to lack standards to guide the jury in selecting among first degree murderers, since any jury which felt the death sentence inappropriate for a given defendant, could avoid the imposition of the death sentence by returning a guilty verdict to a lesser

included offence which did not carry the death penalty, even though there was no evidence whatsoever to support the lesser offense. Further, the Supreme Court of Louisiana had no power to correct such jury nullification. The Court found that such a procedure "... invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate."[38] There is no difference whatsoever in the responsive verdict procedure applied in petitioner's case and that procedure condemned in *Roberts*, and there is no reason to distinguish the cases.

For the reason that Louisiana's mandatory death sentence for the murder of a police officer does not define the crime in terms of the character or record of the accused; for the reason that the statutory definition of first degree murder does not provide any focus on the circumstances of the particular offense; and for the reason that the responsive verdict procedure condemned in *Roberts v. Louisiana, supra,* was in full operation in the petitioner's case, the Court should decline to reach the constitutionality of mandatory death sentences in the general application for the crime of the murder of a police officer, and instead vacate the petitioner's sentence on the procedural grounds identified in *Roberts.*

III.

SUBSTANTIVE DEFECTS IN MANDATORY DEATH SENTENCES FOR THE MURDER OF POLICE OFFICERS.

In *Roberts v. Louisiana, supra,* the Court concluded that mandatory death sentences for murder, as applied

[38]*Roberts v. Louisiana, supra, slip op.*, p. 9.

via former La.R.S. §14:30, were defective both procedurally and substantively.[39] The Court found that:

> "Louisiana's mandatory death sentence law employs a procedure that was rejected by that State's legislature 130 years ago and that subsequently has been renounced by legislatures and juries in every jurisdiction in this nation. The Eighth Amendment ... simply cannot tolerate the reintroduction of a practice so thoroughly discredited." *Slip op.*, at p. 10. (footnotes and citations omitted).

The Court in *Roberts* went beyond mere procedural defects and reached the conclusion that mandatory death sentences, with the express exception of those imposed on persons serving life sentences or persons convicted of prior unrelated murders, were cruel and unusual punishment under the Eighth Amendment as applied to the states via the Fourteenth. In light of this Court's action in reversing the mandatory death sentence imposed under Louisiana law for the murder of a deputy sheriff in *Washington v. Louisiana,* ____ U.S. ____, No. 75-6123, July 6, 1976; *reh'g den.*, October 4, 1976, it is apparent that the Eighth Amendment

[39]The procedural defects noted were lack of focus on the character of the accused and on the circumstances of the particular offense, as well as the defective responsive verdict procedure which allowed arbitrary jury avoidance of the death sentence. These defects were discussed in the previous section.

In *Woodson v. North Carolina,* ____ U.S. ____, No. 75-5491, the Court dealt with mandatory death sentences in more elaborate detail, and at the conclusion of an Eighth Amendment examination of the practice, found that "... one of the most significant developments in our society's treatment of capital punishment has been the rejection of the common-law practice of inexorably imposing a death sentence upon every person convicted of a specified offense." ____ U.S. ____, 96 S.Ct. 2978, 2990.

prohibition in *Roberts* applied to Louisiana's mandatory death sentence for the murder of police officers as well.

There are absolutely no facts or law upon which to distinguish petitioner's case from that of Johnson Washington. Both defendants were tried under La.R.S. §14:30(2); the responsive verdict scheme of La. Code Crim. Proc. Ann., art. 814 was applicable in both cases. The "peace officer" murdered in Washington's case was a deputy sheriff; in petitioner's case, a city policeman. In the absence of a distinguishment of the two cases, a result in petitioner's case contrary to that in *Washington v. Louisiana, supra,* simply cannot be reached without the overruling of *Washington.*[40] Such an unprecedented and unwarranted action would mean that mandatory death sentences for the murder of police officers was cruel and unusual punishment violative of the Eighth Amendment from the date of the issuance of the mandate to the date of a contrary decision in this case. Such a constitutional curiosity would give short shrift to the concepts of *stare decisis*, in light of an apparent shift in position in *less than one year.* Petitioner has no need to develop a "parade of horribles" which would result from a change of course. Such an argument was eloquently and succinctly stated by the Chief Justice in his dissent in *Furman v. Georgia*, 408 U.S. 238 (1972):

> "All of the arguments and factual contentions accepted in the concurring opinions today were considered and rejected by the Court one year ago. . . . [t]he Court entered its judgment, and if *stare decisis* means anything, that decision should be regarded as a controlling pronouncement of

[40] *Green v. Oklahoma,* ____ U.S. ____, No. 75-6451, July 6, 1976, would probably also have to be overruled, since it also involved a mandatory death sentence for the murder of a policeman. See footnote 35, *supra.*

> law. * * * It may be thought appropriate to subordinate principles of *stare decisis* where the subject is as sensitive as capital punishment and the stakes are so high, but these external considerations were no less weighty last year. This pattern of decisionmaking will do little to inspire confidence in the stability of the law." 408 U.S., at 399-400.

Further, the re-approval of a punishment previously declared cruel and unusual by the Court is without precedent. The precedented mode of reintroducing a punishment declared cruel and unusual by a court has been via constitutional amendment, as was the California experience following the decision of *People v. Anderson*, 6 Cal.3d 628, 493 P.2d 880 (1972). Such a course was envisioned as the only alternative by Justice Powell in his dissent in *Furman v. Georgia, supra*:

> "Nothing short of an amendment to the United States Constitution can reverse the Court's judgments. * * * The sobering disadvantage of constitutional adjudication is the universality and permanence of the judgment." 408 U.S., at 462.

The mandatory death penalty has been declared to be cruel and unusual punishment in violation of the Eighth Amendment, with one exception not yet reached for decision. That exception does not include the petitioner's case. The Court should not take the unwarranted and totally unprecedented step of reversing an Eighth Amendment adjudication that has not yet even made its way into the bound volumes of the United States Reports. The substantive ruling of *Roberts* and *Washington* should be followed, and the petitioner's sentence vacated and the case remanded for further proceedings.

CONCLUSION

Since the Supreme Court of Lousiana has not made a final ruling on the question under review, there is no jurisdiction of this Court to entertain the present question, and the writ should be dismissed. Alternatively, should jurisdiction be found to exist, the Court should refrain from the present exercise of jurisdiction, and instead remand the case for consideration of the present question as well as for consideration of the effect of the lack of a saving clause in the 1976 legislation affecting first degree murder.

Louisiana's application of mandatory death sentences for the crime of first degree murder has previously been condemned by this Court; and since the petitioner was tried, convicted and sentenced under this invalid procedure, his sentence should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5206

HARRY ROBERTS,

Petitioner,

versus

LOUISIANA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Louisiana

BRIEF OF STATE OF LOUISIANA, RESPONDENT

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BRIEF OF STATE OF LOUISIANA, RESPONDENT

STATEMENT OF THE CASE

Shortly after 6:30 p.m. on Mardi Gras Day, 1974, Officers John Tobin and Dennis McInerney of the New Orleans Police Department, who were in uniform and were assigned to patrol and answer radio signals in police car 504, received a radio signal of a shooting at 1628 Pauger Street in New Orleans, and at once drove toward that address. When they arrived at the corner of

Pauger and Burgundy Streets they were flagged down by Mrs. Theresa Dorsey, who gave them a description of the person they were looking for (beige jacket, blue jeans, green shirt, and red bandana with knot tied in the back), and who pointed in the direction in which the shootist was fleeing. Proceeding in the direction indicated and with their emergency lights flashing, Officers Tobin and McInerney came upon Harry Roberts at the corner of Kerlerec and Burgundy. Roberts was just turning the corner and was removing a red bandana from his head. The officers gave chase and finally caught up with him on Rampart Street between Kerlerec and Esplanade. They parked the police car at an angle, right in front of Roberts. As Officer Tobin started to open the door of his vehicle, Roberts ran up and shot Tobin in the leg and head. When Officer McInerney jumped out of the police car he was mortally wounded by Roberts' gunfire and fell to the ground, dying almost immediately. Although severely wounded, Officer Tobin managed to draw his service revolver and shoot Roberts in the left leg, whereupon the accused, leaving a trail of blood, ran off and took refuge in the residence of Mrs. Mable Domingo at 918 Kerlerec, where he was captured by the police shortly thereafter. Tr. 1-36; 118-122.[1]

The Grand Jury for the Parish of Orleans indicted Harry Roberts for the first degree murder of Dennis McInerney, a police officer. R. 21. The accused was tried, convicted, and mandatorily sentenced to death. R. 1-22. He appealed to the Louisiana Supreme Court,

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1 See transcript of Louisiana trial proceedings. All record and transcript citations in this brief refer to the Louisiana Supreme Court record which has been forwarded to this Court.

which affirmed his conviction and mandatory death sentence. *State v. Roberts*, 331 So.2d 11 (La. 1976). He petitioned this Honorable Court for a Writ of Certiorari, which was granted on November 8, 1976. Two weeks later this Court entered an order in this case limiting the grant of certiorari to the question of "whether the imposition and carrying out of the sentence of death for the crime of first-degree murder of a police officer under the law of Louisiana violates the Eighth and Fourteenth Amendments to the Constitution of the United States."

PROCEDURAL OBJECTIONS RAISED BY PETITIONER IN BRIEF

On August 12, 1976, Harry Roberts filed his Petition For Writ Of Certiorari in this Honorable Court asking, among other things, that the imposition and carrying out of the mandatory sentence of death which he had received under Louisiana law for first degree murder be held to violate the Eighth and Fourteenth Amendments' ban against cruel and unusual punishments.

At the time petitioner filed his application for certiorari on August 12, 1976, *Stanislaus Roberts v. Louisiana*, 428 U.S. 325 (1976), had already been handed down by this Court on July 2, 1976, and La. Act. 657 of 1976 had already been enacted by the Louisiana Legislature in July of 1976.

Now, following this Court's grant of certiorari herein on November 8, 1976, and its order of November 29, 1976, limiting the grant of certiorari to the con-

stitutionality of the death sentence, petitioner theorizes in the brief which he has filed in this proceeding that this Court has no jurisdiction to entertain the instant case 1) because the Louisiana Supreme Court has not had an opportunity to consider the validity of the mandatory death sentence imposed on him in the light of *Stanislaus Roberts v. Louisiana*, nor has the Louisiana Supreme Court, he argues, specifically considered the constitutional validity of section (2) of La. R.S. 14:30, here at issue; and 2) because La. Act 657 of 1976, which amended and reenacted the murder statute under which he was convicted and sentenced, contained no saving clause and hence, in his view, "there is no criminal liability now existing on the part of the petitioner as regards first degree murder." See petitioner's brief, p. 28.

The State of Louisiana is of the respectful belief that by applying to this Court for a writ of certiorari to review his cause, instead of first pursuing the questions here being urged in the Louisiana courts, petitioner has waived all right to raise these procedural contentions now that, at his request, certiorari has been granted in the matter by this Court.

Alternatively, the State of Louisiana respectfully submits that the procedural issues argued herein by petitioner are absolutely lacking in merit, as will be shown below.

1. **The Question Under Review Has Been Ruled On By The Louisiana Courts**

Both the Louisiana trial court and the Louisiana Supreme Court upheld the constitutionality under the

Eighth and Fourteenth Amendments of La. R.S. 14:30. See *State v. Harry Roberts*, 331 So.2d 11, 16 (La. 1976), relying on *State v. Hill*, 297 So.2d 660 (La. 1974). (The *Hill* case involved section 4 of La. R.S. 14:30). Moreover, it is immaterial that in its opinion in the present proceeding, handed down before *Stanislaus Roberts* was decided, the Louisiana Supreme Court maintained the validity of all five sections of the Louisiana first degree murder statute rather than specifically addressing itself to the constitutional soundness of section (2) only, under which Harry Roberts was prosecuted. No citation of authority is needed in support of the elementary proposition that the whole includes all of the parts, and that in finding La. R.S. 14:30 constitutionally healthy in its entirety and in affirming the conviction and sentence herein, the Louisiana Supreme Court as a matter of course passed on the constitutionality of section (2) thereof, which furnished the basis for the first degree murder charge against Harry Roberts.

Further, there is no reason why the Louisiana courts should have an opportunity to consider the validity of the mandatory death penalty imposed on Harry Roberts in the light of this Court's later decision in *Stanislaus Roberts v. Louisiana, supra*. *Stanislaus Roberts* concerns the constitutional validity of Section 1 of La. R.S. 14:30 ("When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . armed robbery"), and is easy to distinguish from narrowly drawn Section 2 thereof, under which the instant prosecution was brought ("When the offender has a specific intent to kill, or to inflict

great bodily harm upon . . . a peace officer who was engaged in the performance of his lawful duties.")[2]

2. Former La. R.S. 14:30 Has Not Been Retroactively Repealed

In the brief which he has filed in this Court counsel for petitioner contends that because La. Act 657 of 1976, by which the Louisiana Legislature amended and reenacted La. R.S. 14:30, did not specifically exempt prior first-degree murders from its routine final clause repealing "all laws or parts of laws in conflict herewith", it necessarily follows that under Louisiana law all individuals who committed first degree murder prior to October 1, 1976, the effective date of La. Act 657 of 1976, were, by this omission, legislatively granted a full and complete pardon absolving them from all criminal liability for their crimes! In support of this novel theory counsel for petitioner relies on two old Louisiana cases — *State v. Bienvenue*, 207 La. 859, 22 So.2d 196 (1945), and *State v. Thomas*, 149 La. 654, 89 So. 887 (1921) — neither of which, in the respectful belief of the State of Louisiana, furnish a shred of support for such an amazing contention.

State v. Bienvenue, 207 La. 859, 22 So.2d 196 (1945), for example, involves the April 27-28, 1944, offense of gambling which was charged in two bills of information based on the provisions of Act 70 of 1908, which act was expressly repealed in 1942, two years before the gambling took place. In other words, in *Bien-*

2 It was following this Court's limiting order of November 29 herein that the State of Louisiana applied to the Supreme Court of Louisiana for a rehearing in *State v. Johnson Washington*, no. 55,-806, (La. Nov. 30, 1976), also involving the murder of a peace officer.

venue the statute upon which the charge was based had been repealed two years before the crime was even committed, a situation easy to distinguish from the instant proceeding in which the statute upon which the charge is based was amended and reenacted not only long after the commission of the offense, but also after the accused had been convicted, and this conviction had been affirmed on appeal.

Further, in *State v. Thomas*, 149 La. 654, 89 So. 887 (1921), the accused was charged with perjury by swearing, on January 12, 1917, before a deputy registrar of voters. He filed a Motion To Quash, which was maintained in the trial court, and the State appealed. The Louisiana Supreme Court affirmed, pointing out that Section 28 of Act 195 of 1916, the law in force at the time of the offense, was repealed by Section 10 of Act 166 of 1920, which was enacted by the Legislature after the commission of the crime for the purpose of changing the penalty for such false swearing from that of perjury, which was necessarily imprisonment at hard labor for a term not exceeding five years, to imprisonment for not more than one year either with or without hard labor. The Louisiana Supreme Court's opinion in *Thomas* concluded by stating that as the penalty for the crime had been greatly reduced, and because the new act contained no saving clause, it was the Legislature's intent that the new law would take the place of the old, and that the accused therefore had been legislatively pardoned.

Unlike the action of the Louisiana Legislature in *Thomas*, there is nothing in the enactment by the Louisiana Legislature of La. Act 657 of 1976 which in any

fashion indicates that prior murderers are to receive a full pardon. La. Act. 657 of 1976, re-defining the crimes of first degree murder and second degree murder, as well as La. Act 694 of 1976, which provides for a new bifurcated jury procedure in capital cases by adding Articles 905 through 905.9 to the Louisiana Code of Criminal Procedure, were passed by the Louisiana Legislature a few weeks after this Court handed down its July 2, 1976, decisions in *Gregg, Proffitt, Jurek, Woodson,* and *Stanislaus Roberts,* and clearly demonstrate the firm intention of the Louisiana Legislature to punish intentional homicides with death, and to enact legislation toward that end which would be acceptable to this Court.

Furthermore, since La. Act 657 of 1976 became effective on October 1, 1976, the Louisiana Supreme Court has had occasion to affirm several first degree murder convictions based on former La. R.S. 14:30[3] — the identical law which is the basis of the present proceeding — and although the seven justices of that court are well aware of the enactment of La. Act 657 of 1976, and have the authority *ex proprio motu,* and without the issue being raised by the accused, to set aside a completely null conviction which is based on a non-existent statute,[4] none of their opinions affirming first degree murder convictions after October 1, 1976, even refer to the theory here being advanced by counsel for petitioner in his attempt to challenge the jurisdiction of this Court. See, *e.g., State v. Davenport and Richardson,* 340 So.2d 25 (1976); *State v. Smith,* 339 So.2d 829

3 The cases were, however, remanded to the trial court for resentencing to a term of imprisonment under *Stanislaus Roberts v. Louisiana.*

4 See, *e.g., State v. Daye,* 243 La. 725, 146 So.2d 786 (1962).

(La. 1976); *State v. Stanislaus Roberts,* 340 So.2d 263 (La. 1976); *State v. Johnson Washington,* no. 55,806 on the docket of the Louisiana Supreme Court, decided November 30, 1976 (presently pending on Application For Rehearing); *State v. Moore,* nos. 58,446, 58,485, 58,-588 on the docket of that court, decided December 13, 1976; *State v. Jones,* no. 58,483 on the docket of that court, decided December 22, 1976.

For the reasons set out above, the State of Louisiana respectfully submits that the procedural objections raised by petitioner in his brief in this Court have either been waived, or are totally lacking in substance.

ARGUMENT ON THE MERITS

La. R.S. 14:30 (2), before its amendment and reenactment by the Louisiana Legislature[5] shortly after this Court's July 2, 1976, decision in *Stanislaus Roberts v. Louisiana,* 428 U.S. 325, read pertinently as follows:

> "First degree murder is the killing of a human being:
>
> "* * *
>
> "(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, . . . a peace officer who was engaged in the performance of his lawful duties".

At the time of Harry Roberts' trial for the first degree murder of Officer Dennis McInerney in the instant case,[6] a verdict of guilty in such a proceeding auto-

5 See La. Act 657 of 1976.

6 August 15-16, 1974. See R. 7-15.

matically and mandatorily resulted in the imposition of the death penalty. See *Stanislaus Roberts v. Louisiana*, 428 U.S. 325 (1976). Thus, because the jury in the present matter returned a verdict of guilty against Harry Roberts, he was of necessity sentenced to death by the trial court, and the issue for decision in the instant case is whether this mandatory imposition of the death penalty is valid under the Eighth and Fourteenth Amendments' cruel and unusual punishment clause, and hence can be carried out.

It is Louisiana's position herein that former La. R.S. 14:30 (2) can constitutionally support a mandatory death penalty, and that therefore the capital sentence imposed on Harry Roberts is valid and constitutional.

1. The Statute Is Narrowly Drawn

In *Gregg v. Georgia*, 428 U.S. 153 (1976), and its companion cases decided in July of last year,[7] this Court held that the punishment of death for the crime of murder does not in itself and under all circumstances violate the Eighth and Fourteenth Amendments' ban on cruel and unusual punishments, and that under certain circumstances a sentence of death is valid and constitutional, but that capital punishment cannot be imposed in an arbitrary and capricious manner by the unfettered discretion of the sentencing body.

7 *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

Significantly and pertinently, neither of the mandatory death penalty statutes considered by this Court in *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Stanislaus Roberts v. Louisiana*, 428 U.S. 325 (1976), was limited to an extremely narrow, clearly defined category of homicide such as we have in the instant case in La. R.S. 14:30 (2);[8] rather, both *Woodson* and *Stanislaus Roberts* involved a death sentence returned pursuant to a law imposing a mandatory capital penalty for a broad range of killings. Thus, what this Court repudiated in *Woodson* and *Stanislaus Roberts* was not mandatory capital punishment per se, but, rather, a mandatory death sentence automatically inflicted on a large class of convicted murderers who had killed their victims under widely differing circumstances.

Louisiana respectfully submits that a precise, narrowly drawn law like former La. R.S. 14:30 (2) focuses sharply on the circumstances of the particular offense; avoids the constitutional pitfalls deplored by this Court last July in *Woodson* and *Stanislaus Roberts;* and eliminates the arbitrariness and capriciousness criticized in those earlier proceed-

8 Stanislaus Roberts was convicted and mandatorily sentenced to death under the first paragraph of La. R.S. 14:30, which defines first degree murder as the killing of a human being "When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery". Woodson and his coaccused Waxton were convicted and mandatorily sentenced to death under a North Carolina law which states that a murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. See N.C. Gen.Stat. § 14-17 (Cum.Supp. 1975); *Woodson v. North Carolina*, supra.

ings. A statute such as La. R.S. 14:30 (2), it is respectfully submitted, can constitutionally support a mandatory death sentence.

2. The Louisiana Policeman-Murder Law Incorporates An Aggravating Circumstance.

The Louisiana statute under which Harry Roberts has been sentenced to death in the present case made it a capital offense, mandatorily punishable by death, to kill a police officer engaged in the performance of his lawful duties when the offender had a specific intent to kill or to inflict great bodily harm. See former La. R.S. 14:30 (2).

One of the aggravating circumstances which is often found in statutes defining such circumstances for jury consideration in separate sentencing procedures in capital cases is the killing of a police officer who was engaged in his lawful duties, or some variant of this theme. See, *e.g.*, *Gregg v. Georgia*, supra, in which this Court approved a Georgia law providing that before a convicted person could be sentenced to death (except in cases of treason or aircraft hijacking) the sentencing body must find beyond a reasonable doubt one of ten aggravating circumstances, one of them being that the murder was committed against a peace officer who was engaged in the performance of his official duties; see also *Proffitt v. Florida*, 428 U.S. 242 (1976), from which it appears that one of the approved aggravating circumstances considered by a sentencing body in Florida is the fact that the capital felony was done for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; see, too, Model Penal Code, § 210.6 (3) (f) (Proposed Official Draft, 1962), p. 132.

Consequently, it follows that in rendering the intentional killing of an on-duty peace officer a mandatorily capital offense, Louisiana simply incorporated into paragraph (2) of its first degree murder law one of the universally approved statutory aggravating circumstances, with the result that the Louisiana statute at issue requires that the jury focus on the particularized nature of the crime and find beyond a reasonable doubt the existence of a statutory aggravating circumstance before the mandatory death penalty may be imposed. Compare *Jurek v. Texas*, 428 U.S. 262 (1976), in which this Court said pertinently:

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose."

3. No Mitigating Circumstances Are Possible.

But does a sentencing system that allows a jury in a capital case to consider only aggravating circumstances and no mitigating factors meet the requirement of the Eighth and Fourteenth Amendments that punishments be neither cruel nor unusual?

The State of Louisiana is of the respectful opinion that such a sentencing system is valid and constitutional at a trial involving the intentional killing of a peace officer on duty, for the reason that, in Louisiana's view, there are absolutely no mitigating factors possible when a police officer on official business is intentionally killed. The individual offender in such a case can have no worthwhile attributes which might redeem the heinous act of murdering a peace officer.

If the rule of law and the orderly conduct of our society are to be preserved and fostered, no violent physical attack of any kind on a peace officer engaged in the exercise of his duties can ever be tolerated, condoned, excused, or made acceptable. It is firmly settled in the constitutional law of the United States that persons who are illegally arrested or searched have their remedy in our courts of law. They must not be permitted to take matters into their own hands, but, rather, must be made to express their grievances through recognized legal channels. The police officer, as the symbol of law and government, must be viewed as physically unassailable while performing his official acts, for if the front line guardian of the law is not protected at all times from physical abuse and death, the existence of the rule of law itself and the orderly structure of our entire society are directly threatened.

Police officers are often outnumbered by those upon whom they must impose their authority; they are continually asserting the power of the state over desperate, violent persons. Therefore, they can only be

successful in peacefully controlling the volatile situations which they continually face if they are clothed with the indicia of invincibility. It is not the police officer as a human being, but rather as the incarnation of the state, who must, while on duty, be insulated from brutal attack; a murderous act against him must be forbidden in all situations; and the news must be broadcast throughout the land that a person who intentionally kills a police officer performing his duty will pay for the act with his life.

Any other view, the State of Louisiana respectfully suggests, gravely weakens the prospects in America for an orderly, law-abiding society.

4. The Louisiana Responsive Verdict System Did Not Render The Louisiana Police-man-Murder Law Capricious In Its Results, Nor Was Appellate Review Of The Mandatory Death Sentence Necessary

At the time of Harry Roberts' trial and conviction for the murder of Officer Dennis McInerney (August 15-16, 1974), Article 814(A)(I) of the Louisiana Code of Criminal Procedure[9] provided that the responsive verdicts which the jury could render in a first degree murder case were: guilty, guilty of second degree murder, guilty of manslaughter, and not guilty.[10]

---

9 As amended by La. Act 126 of 1973.

10 For a definition of second degree murder and manslaughter under Louisiana law at the time of the instant trial, see La. R.S. 14:30.1, as added by La. Act 111 of 1973, and La. R.S. 14:31, as amended by La. Act 127 of 1973.

The State of Louisiana believes that under the circumstances of the instant case these responsive verdicts in no way rendered the mandatory death penalty required by the Louisiana policeman-murder law violative of the Eighth and Fourteenth Amendments.

The trial judge in the present case instructed the jury at length concerning the possible verdicts they could return — not guilty; guilty as charged, which would be guilty of first degree murder; guilty of second degree murder; and guilty of manslaughter. He defined clearly the elements of, and the punishment required for, each crime, and succinctly explained to the jury in everyday language the differences between the three offenses. Thus, he instructed the jury that the essential elements of first degree murder were that a police officer engaged in the performance of his official duties had been killed, and that the wound was inflicted with the specific intent to either kill or to inflict great bodily harm, "without any excuse or justification"; that the essential elements of the crime of second degree murder were identical with those of first degree murder "with the exception that second degree murder does not have any provision as to a police officer or a fireman who would be engaged in his official duty"; and that manslaughter was a killing committed under the influence of passion induced by serious provocation.

Furthermore, the trial judge in the present proceeding charged the jury as follows:

> "Now, should you entertain a reasonable doubt as to the grade of the offense committed,

> it would be your duty to find the defendant guilty only of that grade of which you are convinced beyond a reasonable doubt of which (sic) he is guilty."

In connection with the foregoing, see Charge To The Jury By The Court, August 16, 1974, a certified copy of which has been forwarded to this Court.

The State of Louisiana is of the respectful belief that in his charge in this case the trial judge provided the jury with standards to channel their judgment as to whether or not the accused was guilty of intentionally killing a police officer engaged in performing his lawful duties, and that these instructions, coupled with the extreme narrowness of the statute which formed the basis of the first degree murder charge against Harry Roberts, render the mandatory death sentence here at issue acceptable under the Eighth and Fourteenth Amendments.

Further, because of these same factors no appellate review by the Louisiana Supreme Court of the mandatory imposition of the death sentence was necessary to ensure that it was not the capricious result of an arbitrary exercise of unfettered jury discretion.

CONCLUSION

In conclusion, it is respectfully submitted that because the Louisiana first degree murder law involved in this case is narrowly drawn, focuses on the particular circumstances of the crime, and incorporates into itself a statutory aggravating circum-

stance; and, further, because no mitigating circumstance is possible in the murder of an on-duty police officer, and the trial judge's instructions to the jury concerning the various responsive verdicts were precise and clear, the mandatory capital sentence imposed on petitioner herein is constitutional under the Eighth and Fourteenth Amendments, and should be carried out.

Therefore, the State of Louisiana respectfully asks this Honorable Court to uphold the judgment of the Louisiana Supreme Court affirming the conviction and mandatory death sentence of Harry Roberts.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5206

HARRY ROBERTS,

Petitioner,

versus

LOUISIANA,

Respondent.

On Writ of Certiorari to the
Supreme Court of Louisiana

SUPPLEMENTAL BRIEF OF STATE OF LOUISIANA, RESPONDENT

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SUPPLEMENTAL BRIEF OF STATE OF LOUISIANA, RESPONDENT

MAY IT PLEASE THE COURT:

In connection with petitioner's procedural objection that former La. R.S. 14:30 has been retroactively repealed through the lack of a saving clause in La. Act 657 of 1976, this Honorable Court's attention is directed to La. R.S. 24:171, which provides as follows:

> "The repeal of any law shall not have the effect of releasing or extinguishing any penalty, forfeiture or liability, civil or criminal, incurred under such law unless the repealing act

expressly so provides, and such law shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

A recent Louisiana Supreme Court decision in point is *State v. Paciera*, 290 So.2d 681 (La. 1974).

Respectfully submitted,

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TO THE SUPREME COURT OF LOUISIANA

REPLY BRIEF FOR PETITIONER

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TO THE SUPREME COURT OF LOUISIANA

REPLY BRIEF FOR PETITIONER

Having examined the arguments of the respondent and the *amici* herein, the petitioner now wishes to clarify certain of his arguments at issue herein in preparation for oral argument.

I.

JURISDICTION

The existence of jurisdiction herein, and the question of whether such jurisdiction should be exercised if it does exist, in the petitioner's estimation is the most serious issue raised herein. In petitioner's original brief, three points relating to the issue of jurisdiction were raised:

1. The issue under consideration was never the subject of a final decision by the Supreme Court of Louisiana, as is required by 28 U.S.C. §1257.
2. Even if jurisdiction does exist, the Court should decline to hear the case so as to enable the Supreme Court of Louisiana to hear the present issue in light of the decision in *Stanislaus Roberts v. Louisiana*, ____ U.S. ____, No. 75-5844 (July 2, 1976).
3. The respondent lacks standing herein to defend the imposition of the death sentence for the reason that Act 657 of 1976, which amended and reenacted La. R.S. §14:30 had no saving clause.

Despite the argument of the respondent, two of these points are still very much at issue.[1]

The State's response to these two remaining arguments is similarly twofold:

1. By failing to ask the Supreme Court of Louisiana to reconsider his case in light of *Stanislaus Roberts, supra*, the petitioner thereby

[1] The argument concerning the effect of a lack of a saving clause is now abandoned by the petitioner. See: La. R.S. §24:171; *Respondent's Supplemental Brief*, p. 1-2.

waived the procedural objection to a lack of final judgment.

2. The Supreme Court of Louisiana did in fact consider the instant question, since their review of the whole of La. R.S. §14:30 necessarily entailed a review of all of its parts.

Both of these points are unsupported by statutes or caselaw, and sustaining either of them would require a shocking departure from traditional notions of jurisdiction, as petitioner now begs leave to show.

A. A WAIVER OF A FINAL JUDGMENT?

The Supreme Court denied a rehearing of petitioner's appeal on May 14, 1976,[2] and according to Rule 22 of this Court, the 90-day time limit for applying for a writ of certiorari began to run on that date. At that time, *Roberts v. Louisiana, supra*, was under consideration by the Court, but petitioner then had no way of forecasting what decision the Court would render. On May 14, 1976, there was no new grounds upon which to ask any Louisiana court to reconsider petitioner's case. Counsel for petitioner then began the preparation of an application for a writ of certiorari.

During the 90-day time limit for the application, the Court handed down the *Roberts* decision, on July 2, 1976, and the decision in *Washington v. Louisiana*, ____ U.S. ____, No. 75-6123, (July 6, 1976), the latter case involving a mandatory death sentence for the murder of a peace officer. At the time of these decisions, petitioner had slightly over a month left of

[2] A., p. 21.

the 90-day time limit. But there was nothing in either the *Roberts* or the *Washington* decisions to indicate that petitioner's sentence would still be at issue: in *Washington*, the same sentence for the same crime tried under the same laws was vacated. The state of Louisiana apparently shared this opinion.[3]

The petitioner was then faced with a situation wherein his death sentence was apparently invalid, but in which he also had other points that might serve to secure a new trial. However, the *Roberts* decision was not yet final, as a rehearing had been applied for by the State: though a grant of rehearing was unlikely, but not impossible, the petitioner could not be absolutely sure of the invalidity of his death sentence at that time, and any application for resentencing made in Louisiana courts would most likely be held up until this Court acted on the rehearing application, which would have occurred after the 90-day limit for a petition for certiorari had expired.[4] Rather than face the possible difficulty in petitioning for certiorari beyond the time limit, petitioner decided to continue his plans for the certiorari petition, and presented the death penalty objection therein as a matter of form, adopting the arguments in *Roberts* by reference.[5]

---

[3] See *Petitioner's Original Brief*, p. 20, n. 12.

[4] The applications for rehearing were denied at the beginning of the following term, on October 12, 1976. See: ____ U.S. ____, 97 S.Ct. 248 (1976).

[5] See *Petition for Certiorari*, p. 13.

The petition for certiorari herein was filed on August 12, 1976. Rehearings in *Roberts* and *Washington* were denied on October 12, 1976.[6]

In its opinion on petitioner's appeal, the Supreme Court of Louisiana considered the validity of La. R.S. §14:30 as a whole, and did not consider the narrow question of mandatory death sentences for those who murder police officers.[7] That court's approval of the statute was general; this Court's disapproval of the statute was general;[8] and consequently, petitioner's argument in his petition for certiorari was general. The narrowing of the issue to focus on the murder of police officers did not occur until the order of this Court on November 29, 1976.[9] It was only then, on November 29, 1976, that it became apparent that the present question was not the subject of a final decision by the Supreme Court of Louisiana. Had this Court taken up the issue of the general validity of La. R.S. §14:30, there could be no doubt but that the state court *did* finally decide that issue. But assuming *arguendo* that the instant issue was not decided by the Louisiana court, how can the petitioner be taxed with the failure

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[6] *Roberts v. Louisiana*, ____ U.S. ____, 97 S.Ct. 248 (1976); *Washington v. Louisiana*, ____ U.S. ____, 97 S.Ct. 248-49 (1976).

[7] A., p. 30.

[8] This Court's disapproval of Louisiana's mandatory death penalty was virtually a blanket condemnation, with the footnoted exception of the possible validity of such sentences for those convicted murderers who have a prior murder conviction or who are serving a life sentence. See *Roberts v. Louisiana, supra, slip op.*, p. 8, n. 9.

[9] A., p. 32.

to seek a decision from the Louisiana Supreme Court on the narrow question when the need for such a decision did not manifest itself until *after* certiorari was granted?

But the State now argues in its brief that since the petitioner failed to seek such a decision at an earlier date, the petitioner has now "waived" the right to object to the lack of such a decision.

28 U.S.C. §1257 provides this Court with jurisdiction to review the decisions of state courts *only* when such are the *final* decisions of the highest court in that state in which such a decision can be had. The final judgment is not a mere formality–it is an absolute *requirement* prior to assuming jurisdiction. And this requirement can be waived by no one: neither by the petitioner, the respondent, nor the Court. Without a final judgment, there is without exception simply no jurisdiction. To allow such a waiver would be to make 28 U.S.C. §1257 totally pointless, for in such cases, state review could completely be dispensed with.

The traditional view of the effect of a "waiver", or deliberate by-pass of state remedies–particularly in the case of a writ of habeas corpus–has been that federal review is precluded rather than conferred due to the bypass.[10] This doctrine of abstention, rather than premature involvement, was articulated by Justice Frankfurter for the Court in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941):

> "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus

[10] *Fay v. Noia*, 372 U.S. 391 (1963); *Henry v. Mississippi*, 379 U.S. 443 (1965).

> supplanted by a controlling decision of a state court. * * * (Citations omitted). These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, "exercising a wise discretion", restrain their authority because of "scrupulous regard for the rightful independence of the state governments" and for the smooth working of the federal judiciary."

This abstention theory became known as the *Pullman* doctrine, and has been scrupulously followed since.[11] In light of this overwhelming caselaw, it would indeed be anomalous for the petitioner, as a penalty for failure to exhaust state remedies, to be afforded review rather than dismissal.[12]

There can be no denial of the fact that the present question was defined as such on November 29, 1976, and the petitioner cannot reasonably be expected to have intuited the question in advance of that date. There can be no waiver of the statutory requirement of

[11] *Burford v. Sun Oil Company*, 319 U.S. 315 (1943); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960).

[12] Contrary to the majority of criminal cases reviewed on defendant's petition for certiorari, the grant of certiorari herein on the question selected does not hold the possibility of greater benefits than a denial of certiorari would hold: for without the Court's action in granting certiorari, the petitioner's death sentence would have most likely been set aside by the Supreme Court of Louisiana under the controlling decisions in *Roberts* and *Washington, supra,* and the State would then have had to assume the traditional petitioner's burden of attempting to distinguish those cases from the instant one. The Court's action has placed the petitioner in the novel position of having to attack the jurisdiction of his own writ.

a final judgment; even so, the petitioner has made no such waiver: the question is now whether the Supreme Court of Louisiana has indeed rendered a final judgment on the question under review.

B. WAS THERE A FINAL JUDGMENT?

The respondent argues that approval by the Louisiana Supreme Court of La. R.S. §14:30 in its entirety connotes an approval of each part thereof. The petitioner does not dispute the elementary maxim that the whole equals the sum of its parts. But we cannot overlook the jurisprudential developments since La. R.S. §14:30 was approved in toto by the Supreme Court of Louisiana. Since the denial of rehearing on petitioner's appeal, La. R.S. §14:30 was disapproved in its entirety in *Roberts v. Louisiana, supra,* with the possible exception of section (3) thereof.[13] The Court specifically did not reach the validity of La. R.S. §14:30(3), so the Louisiana Supreme Court, in a case involving that section, would certainly have something new to review in light of *Roberts*, despite an earlier approval of that section. The new question presented for review would be whether section (3) would be constitutionally severable from an otherwise unconstitutional statute.

Totally ignoring for the present the effect of *Washington, supra,* if there are new grounds for state review of section (3) offenses, why is there not also new grounds for state review of section (2) offenses? To be separately valid, section (3) cases would have to

[13]See note 8, *supra.*

override the objections noted in *Roberts*. Section (2) cases would similarly have to be shown to be beyond the *Roberts* objections. Since the last state review of La. R.S. §14:30 occurred prior to the *Roberts* decision, it cannot be argued that the *Roberts* objections were previously passed on by the Supreme Court of Louisiana.

Now we shall consider the effect of *Washington v. Louisiana, supra,* the effect of which appears to have been totally overlooked by the State in its brief. In *Washington*, this Court specifically vacated a mandatory death sentence for the murder of a peace officer under La. R.S. §14:30(2). Petitioner was tried for a violation of the same statute, under the same trial procedures. Should there be some distinguishing feature between *Washington* and the petitioner's case–and the Court has yet to be presented with any distinguishment–such should be urged first in state court.

> "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."[14]

Louisiana's views of the federal question implicit on La. R.S. §14:30 were "corrected" via *Roberts* and *Washington.* Should not Louisiana therefore, consonant with the holding of *Herb v. Pitcairn*, quoted above, be allowed to correct its own judgment in the petitioner's

[14]*Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

case? Louisiana should be allowed, for the sake of comity at the very least, to find a distinction if it can between *Washington* and the petitioner's case.

28 U.S.C. §1257 *requires* a final judgment, and allows for no waiver of this requirement by anyone. The Supreme Court of Louisiana has not rendered a final judgment on the instant question–there is no jurisdiction. In the alternative, and should the Court find such jurisdiction to exist, the Court should decline to exercise the jurisdiction–in the grounds of comity, at the very least–in order to allow the Supreme Court of Louisiana an opportunity to consider the present question.

II.

PROCEDURAL OBJECTIONS

> "[W]e hold . . . that in capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence."[15]

In *Roberts v. Louisiana, supra,* this Court noted for possible exception from the decision section (3) of La. R.S. §14:30. The reason stated for this possible exception was that the section provided for some focus on the character or record of the individual offender. That other sections of La. R.S. §14:30 were narrowly

[15]*Gregg v. Georgia,* ____U.S. ____, 96 S.Ct. 2909, at 2933, n. 38.

drawn did not save those sections from condemnation, since they provided no inherent focus on the character of the accused nor on the circumstances of the particular offense. *Roberts*, which specifically concerned murder in the course of an armed robbery–La. R.S. §14:30(1)–found:

> "Even the other more narrowly drawn categories of first degree murder in the Louisiana law afford no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by attributes of the particular offender."[16]

Roberts therefore noted that though other sections of La. R.S. §14:30 were narrowly drawn, they did not–with the noted exception of section (3)–provide the constitutionally required focus on the character or record of the accused. Surely, if section (2), which proscribed the murder of peace officers, was also meant to be excluded from the effect of the *Roberts* decision as was section (3), some mention of this exclusion would have been made in the opinion, and *Washington* would not have been decided as it was. If the mandatory death sentence for the murder of police officers was valid despite the *Roberts* decision, then this Court surely would not have reversed just such a sentence four days following the *Roberts* decision, in *Washington.*

In defense of former La. R.S. §14:30(2), the State advances three propositions in its brief:

1. Section (2) incorporates a universally accepted "aggravating" circumstance.

[16]*Roberts v. Louisiana, supra, slip op.*, p. 8.

2. There can be no "mitigating" circumstances for the murder of a peace officer.
3. Louisiana's responsive verdict system, coupled with a lack of sentencing review, nevertheless satisfies constitutional requirements.

We shall, for the moment, totally ignore *Washington* and shall consider each of the State's arguments on the merits.

First, there can be no doubt but that the murder of a police officer is defined as an aggravating circumstance in a sizeable number of jurisdictions. And, without conceding the sufficiency of the reasons for making such an aggravating circumstance, the petitioner recognizes that the predicate for such as an aggravating circumstance is the considerations of effective law enforcement. Accepting *arguendo* the rationale for the aggravating circumstance, we now turn to the State's argument that there can be no mitigating circumstances. But upon what rationale is this pre-emption of mitigating circumstances based? Obviously, upon the same considerations of effective law enforcement.[17]

The State, in effect, does not argue that the classical circumstances of mitigation cannot exist; but rather than such circumstances cannot sufficiently mitigate the severity of the offense–that the magnitude of the offense somehow pre-empts any existing mitigating circumstances. Under new La. R.S. §14:30, and related new statutes, the following have been designated as mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

[17]*Respondent's Brief*, pp. 14-15.

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;
(c) The offense was committed while the offender was under the influence or domination of another person;
(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;
(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;
(f) The youth of the offender at the time of the offense;
(g) The offender was a principal whose participation was relatively minor;
(h) Any other relevant mitigating circumstance.[18]

Neither the State nor anyone else can show that any of the above circumstances cannot exist in the case of the murder of a peace officer. These circumstances are not concerned with the nature of the crime, its relative atrocity, or of the characteristics of the victim. Rather, grounds for mitigation are to be found, as this Court has ruled, in the character of the particular offender and the circumstances of the particular crime.

The circumstances for aggravation traditionally concern the nature of the crime, among other factors. Therefore, in arguing for making the murder of a police officer an aggravating circumstance, one would be advancing an argument customarily concerning the nature of the crime.

[18]La. Code Crim. Proc. Ann. art 905.5 (1977 Supp.)

The traditional circumstances of mitigation concern the characteristics of the accused. An argument against mitigation therefore properly would be based upon the absolute incapacity of the accused to have any mitigating characteristics whatsoever: not that the crime was so heinous, but that the accused is so irredeemable. In this light, the fact that the victim was a peace officer, since it relates to the nature of the crime, is proper to show aggravation; but since that fact does not relate *per se* to the characteristics of the accused, it is improper to negate mitigation.

The State's use of the terms aggravating and mitigating when speaking of former La. R.S. §14:30 tends to give that statute an undeserved aura of constitutionality. The former statute allowed no consideration of aggravating and mitigating circumstances, as had occurred in *Proffitt* and *Gregg*,[19] nor was there any post-conviction consideration of the defendant's character, as in *Jurek*.[20] With "built-in" aggravation and no mitigation allowed, former La. R.S. §14:30(2) is nothing more than a mandatory death sentence statute, pure and simple, and any talk of aggravating or mitigating factors contained therein only serves to cloud the issue.

In visualizing the Court's decisions of July 2, 1976, the image of the scales of justice is particularly apt: In determining whether a death sentence should be

[19]*Proffitt v. Florida*, ____U.S. ____, No. 75-5706 (July 2, 1976); *Gregg v. Georgia*, ____U.S. ____, No. 74-6257 (July 2, 1976).

[20]*Jurek v. Texas*, ____U.S. ____, No. 75-5394 (July 2, 1976).

imposed, aggravating circumstances are to be balanced against mitigating circumstances. Under former La. R.S. §14:30(2), the State had completely removed the plate from the scale which would receive the mitigating factors, and had cemented to the opposing plate the weight of the "built-in" aggravating circumstance. Thus it was that the preordained outcome of this balance was always certain upon conviction–death–unless the jury made unauthorized use of Louisiana's responsive verdict system to avoid the imposition of the death sentence.[21]

The State, in defense of the responsive verdict scheme,[22] argues that there was no jury abuse of the procedure in the instant case. That such is true is obvious, for if the jury *had* abused the responsive verdict system, then certainly the petitioner would not be before the Court under a death sentence. But the defect in the system identified in *Roberts* was not that the jury did abuse the system in a given case, but rather that mandatory sentences in gereral would engender such jury nullification.[23] It is this *de facto* discretion vested in the jury which rendered arbitrary the death sentences imposed thereunder. The constitutional defect emanates from the law and its effect, rather than from its application in a given case. That the jury in petitioner's case did not avoid a death sentence is obvious, but irrelevant: that it *could* have done so is controlling.

[21]See La. Code Crim. Proc. Ann. art. 814(A)(1) (1977 Supp.)

[22]Though the State here attempts to justify the responsive verdict scheme, *Roberts v. Louisiana* did nothing if it did not categorically and totally condemn such a system in capital cases under a mandatory death sentence.

[23]*Roberts v. Louisiana, supra, slip op.*, pp. 8-9.

III.

SUBSTANTIVE DEFECTS

Hitherto in this brief, the petitioner has considered the arguments of the State under the assumption that *Washington v. Louisiana, supra,* did not exist. It is now appropriate to examine the effect of that decision, and the effect cannot be avoided or ignored.

Washington was convicted of the murder of Deputy Sheriff James Arterbury of St. Charles Parish,[24] under La. R.S. §14:30(2), which had been in effect only two days when Washington's crime occurred. Petitioner's crime occurred on February 26, 1974, and there had been no amendment of the statute since its enactment. The petitioner was therefore accused of the same offense as was Washington.

Washington was tried on January 31, 1974, with the jury being instructed as to the responsive verdicts of Code of Criminal Procedure article 814(A)(1).[26] Petitioner was tried on August 16, 1974, and the jury was charged in accordance with article 814, which had not been amended since Washington's trial.

On July 6, 1976, this Court vacated and remanded *Washington.* Petitioner and Washington were convicted of violating the same law, they were tried under the same procedure, and they received the same sentence.

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[24]*State v. Washington*, 321 So.2d 763, 764 (La. 1975).

[25]La. Acts 1973, No. 109 reenacted R.S. 14:30, and became effective on July 2, 1973. The murder of Deputy Arterbury occurred on July 4, 1973.

[26]*State v. Washington*, supra, at 765.

The State has argued no grounds to distinguish the cases, and the petitioner respectfully suggests that no distinguishment can be found.

The constitutional defects found in *Washington* are no less weighty now, eight months later. In *Washington*, Louisiana's mandatory death sentence for the murder of a peace officer was found to be in violation of the Eighth and Fourteenth Amendments. Since there can be no distinguishment of the petitioner's case, the same result should obtain herein.

CONCLUSION

In view of the arguments presented in this and in his original brief, petitioner respectfully suggests to the Court that there is no jurisdiction to consider the present question since the Supreme Court of Louisiana has not rendered a final judgment on the issue; that alternatively, should jurisdiction be found to exist, the Court should decline to exercise such jurisdiction so as to allow the Supreme Court of Louisiana to first consider the issue; that the procedural defects identified in *Roberts* and *Washington* are present in petitioner's case, and the same result should therefore obtain in petitioner's case; and that La. R.S. §14:30(2) was found to be cruel and unusual punishment in *Washington*, and there is no reason for this Court to take the drastic and totally unprecedented step of reversing an Eighth Amendment adjudication.

All of which is most respectfully submitted.

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APPENDIX

There have been filed herein three briefs of *amici* in support of the respondent, the State of Louisiana. The brief of *amici*, Americans for Effective Law Enforcement, Inc., et al, generally presents the argument that mandatory death sentences for those who murder policemen are necessary to further the considerations of effective law enforcement. The same argument was presented by the respondent by brief, and petitioner has dealt with this argument earlier in this reply brief.

The states of California and New York have joined as *amici* since, as revealed by their respective briefs, certain mandatory death sentence laws in their states have been drawn into question by their state courts due to the decision in *Roberts v. Louisiana, supra.* The petitioner is confident that the Court will not use his case as an opportunity to delve into the constitutionality of the laws of other states, since the petitioner is certainly not prepared to launch an attack on those laws as well as the laws of Louisiana. The experience of the *amici* states should serve only to argue the possible effect of the decision in this matter.

The arguments of these *amici* concentrate upon the previously mentioned considerations of effective law enforcement. Only the State of New York in its brief attempts to deal directly with the effect of *Washington v. Louisiana, supra,* by suggesting that the Court in reversing *Washington* did so in a torrent of per curiam reversals following the major decisions, and did not take sufficient time to weigh the impact of the reversal. Otherwise, the amicus argues, why would the Court grant certiorari herein on the present question? Why, indeed, for the petitioner candidly admits to the Court

his difficulty in understanding the grant of certiorari in light of the definitive decisions in *Roberts* and *Washington* less than a year earlier.

The petitioner will not concede—and indeed, would be greatly dismayed to discover—that the decision in *Washington*, or in any case before the Court, was a product of judicial oversight. The petition for certiorari in *Washington* was required to contain all relevant information on the case, and surely there was mention of the fact that the victim was a peace officer. Petitioner simply cannot accept the proposition that the Court was not aware of what it was doing when it reversed the sentence in *Washington.*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5206

HARRY ROBERTS,

Petitioner,

v.

LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUE CURIAE* IN SUPPORT OF RESPONDENT

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Statement of Interest of Amicus State of New York

As the chief legal officer of the State of New York (N.Y. Executive Law § 63) and under a lawful duty to defend the constitutionality of New York Statutes (See N.Y. Executive Law, § 71), the Attorney General is concerned with maintaining an equitable balance between effective law enforcement to protect society against crime and the observance of individual liberties and rights in the administration of criminal justice. In the context of the instant case, the specific interest of the Attorney General and the State of New York is most germane, as will be seen since New York, in 1974, enacted new laws defining murder in the first degree and the punishment therefor—namely a mandatory

death penalty in very narrow and extremely limited circumstances. This was part of New York's response to this Court's decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), the total response being both judicial and legislative.

Judicially, New York's highest court, the Court of Appeals, on constraint of *Furman, supra,* declared unconstitutional New York's former Penal Law (§§ 125.35 and 125.30) which defined murder, and provided for a bifurcated proceeding before a jury, which, in its discretion, could report its agreement to inflict the death penalty. The case was *People* v. *Fitzpatrick*, 32 N Y 2d 499 (1973), which had been pending on appeal (but not perfected) when this Court decided *Furman, supra.* Fitzpatrick had shot and killed two police officers while fleeing from an armed robbery of a gas station. The former statute, under which he had been convicted limited the possible infliction of the death penalty to the intentional killing of a police officer, or to the killing of an officer during a felony or to a murder in prison by a life term prisoner. All other murders were subject to from 15 years to life imprisonment (former Penal Law § 70.00[2, 3, a]). The State's Petition for Certiorari to this Court was denied, *sub nom. New York* v. *Fitzpatrick*, 414 U.S. 1033 (1973).

New York's 1974 legislative (L. 1974, c. 367) response to *Furman* is found in the current New York Penal Law and takes the following form:

§ 125.27 Murder in the first degree

A Person is guilty of murder in the first degree when

1. With intent to cause the death of another person, he causes the death of such person; and

(a) Either:

(i) the victim was a police officer as defined in subdivision 34 of Section 1.20 of the criminal procedure law who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was a police officer; or

(ii) the victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was killed in the course of performing his official duties, and the defendant knew or reasonably should have known that the victim was an employee of a state correctional institution or a local correctional facility; or

(iii) at the time of the commission of the crime, the defendant was confined in a state correctional institution, or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the crime, the defendant had escaped from such confinement or custody and had not yet been returned to such confinement or custody; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

2. In any prosecution under subdivision one, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime except murder in the second degree.

Murder in the first degree is a class A-I felony."

"§ 60.06 Authorized disposition; murder in the first degree

When a person is convicted of murder in the first degree as defined in section 125.27, the court shall sentence the defendant to death."

All other murders in New York are defined as murder in the second degree (Penal Law § 125.25) and are punishable by indeterminate sentences, the minimum of which "shall be not less than fifteen years nor more than twenty-five years" and the maximum of which "shall be life imprisonment * * *." (Penal Law § 70.00 [1, 2-a, 3-a-i]).

Since those enactments, this Court handed down five major opinions on July 2, 1976, dealing with the constitutionality, per se, of the death penalty and the constitutionality of its imposition. (*Gregg* v. *Georgia,* 428 U.S. —— 49 L. Ed. 2d 859; *Proffitt* v. *Florida,* 428 U.S. ——, 49 L. Ed. 2d 913; *Jurek* v. *Texas,* 428 U.S. ——, 49 L. Ed. 2d 929; *Woodson and Waxton* v. *North Carolina,* 428 U.S. ——, 49 L. Ed. 2d 944; and, *Roberts* v. *Louisiana,* 428 U.S. ——, 49 L. Ed. 2d 974).

Following on July 6, 1976, this Court, in a large number of memorandum cases (428 U.S. ——, 49 L. Ed. 2d 1205 et seq.), remanded for further proceedings 34 death cases to North Carolina; 3 death cases to Louisiana (pp. 1212-1213, *supra*); and 6 death cases to Oklahoma (pp. 1214-1215, *supra*).

One of the Oklahoma cases so remanded to the Court of Criminal Appeals of Oklahoma was *Green* v. *Oklahoma* (428 U.S. ——, 49 L. Ed. 2d 1214, No. 75-6451, reversing 542 P. 2d 551 [1975]). The Oklahoma statute at issue involved ten different categories of homicide subject to the death penalty. Green killed a police officer.

So too, presumably because of the broad North Carolina statute nullified in *Woodson, supra,* another killer of a police officer (Chief Lashly) was saved (*Sparks* v. *North Carolina,* 428 U.S. ——, 49 L. Ed. 2d 1212, No. 74-669, 7/6/76, reversing 285 N.C. 631, 207 S.E. 2d 712 [1974]).

Another Louisiana case remanded on July 6, 1976 by this Court was *Washington* v. *Louisiana* (428 U.S. ——, 49 L. Ed. 2d 1213, Case No. 75-6123, reh'g den 10/4/76, 45 U.S. L.W. 382 [10/12/76]). Washington had been convicted under the five category mandatory Louisiana death statute for the intentional killing of "a peace officer who was engaged in the performance of his lawful duties", by shooting the victim in the back, the victim being Deputy Sheriff James Allen Arterbury of St. Charles Parish (See: *State* v. *Washington,* 321 So. 2d 763 [La. 1974]).

Clearly, as a result of this Court's actions, *supra,* New York's mandatory death penalty statute has been placed in doubt, some of our New York courts conflicting with one another in cases involving the killing of police officers.

Thus, Justice McQuillan (Criminal Trial Term, Supreme Court of the State of New York, New York County, in *People* v. *Joseph Velez* [not officially reported, but reported on October 26, 1976 in the New York Law Journal, pp. 12-14, cols. 4, 5, 6 and 1]) held New York Penal Law § 60.06, *supra,* unconstitutional on what the Justice believed to be the constraint of *Woodson, supra* and *Roberts, supra*— that a mandatory death penalty statute was unconstitutional.

On the other hand, Justice Rinaldi (Kings County, Criminal Trial Term) rejected defendant's similar constitu-

tional challenge to the death penalty and imposed the death sentence on November 22, 1976 in *People* v. *Joseph James* (not reported) the sentence being stayed pending a direct appeal to the Court of Appeals of the State of New York, the State's highest Court.

So too, in another case before Justice Roberts in New York County Supreme Court, involving another defendant, also named Velez (approximately a week prior to Justice McQuillan's decision, *supra*), the local New York City media advised the Court approved a plea to Murder, Second Degree, in satisfaction of charges that the defendant had killed two police officers (Murder, First Degree). It was reported that primarily due to fears the death penalty statute would be held unconstitutional, and, hence might require a new trial, amongst other legal difficulties, the District Attorney felt constrained to recommend the plea with its accompanying lengthy sentence.

Furthermore, there is also now awaiting argument before New York's Court of Appeals, a direct appeal in the case of *People* v. *Joseph Davis,* in which the New York statutes, *supra,* are being challenged, primarily upon this Court's recent decisions, *supra.* The Attorney General has intervened in such appeal, pursuant to Executive Law § 71 and has submitted his brief in support of the New York statutory scheme. Thus, New York's interest in the instant case is immediate.

ARGUMENT

The imposition and carrying out of a mandatory sentence of death for the crime of first degree murder of a police officer under the Law of Louisiana is non-violative of the Eighth and Fourteenth Amendments to the Constitution of the United States.

1. In General

In the Attorney General's view, the majority of this Court has decided that the concept of capital punishment, per se, and the imposition of the death penalty under all circumstances are not unconstitutional or violative of the Eighth and Fourteenth Amendments. (*Gregg* v. *Georgia, Proffitt* v. *Florida, Jurek* v. *Texas, Woodson* v. *North Carolina* and *Roberts* v. *Louisiana, supra*).

"The issue, like that in *Furman,* involves the procedure employed by the State to select persons for the unique and irreversible penalty of death." (*Woodson, supra,* at p. 951).

So too, after a careful reading of *Woodson, supra* and *Roberts, supra, inter alia,* the Attorney General submits it is clear that at this time it cannot be said that all mandatory death sentences are, per se, unconstitutional and violative of the federal standards. To hold otherwise would too broadly interpret the recent opinions of this Court.

Therefore, we first turn to the actions and words of this Court from July, 1976 to and including the recent limited grant of certiorari (11/30/76) in this case, *Harry Roberts* v. *Louisiana,* to aid us in better framing our question and arriving at a reasonable evaluation of a mandatory death penalty for the killing of a police officer.

Support for New York's position is found in the very circumstances, opinions or summary dispositions depicted

in *Woodson, S. Roberts, Green* v. *Oklahoma,* and *Harry Roberts, supra.* Analysis of these cases, in our opinion, shows the Court was generally dealing with what it perceived to be broad, sweeping and all encompassing mandatory condemnations in the particular cases then before it.

Thus, examination of the statutes of North Carolina, Louisiana and Oklahoma applicable to the *Woodson, Roberts* and *Green,* decisions, *supra* (*Woodson,* at p. 950; *Roberts* at pp. 979-980) depicts the broad overreach of homicidal categories punishable by death under the respective laws of especially North Carolina and Oklahoma.

Further indication that this Court did not intend to bar all mandatory death penalty statutes is seen at almost the very beginning of *Woodson,* (p. 951) where, the court, after characterizing North Carolina statutes as encompassing, "a broad category of homicidal offenses," in footnote 7, stated:

> *"This case does not involve a mandatory death penalty statute limited to an extremely narrow category of homicide,* such as murder by a prisoner, serving a life sentence, defined in large part in terms of the character or record of the offender. We thus express no opinion regarding the constitutionality of such a statute. See n. 25, *infra."* (Emphasis added)

While the specific example given in the footnote alludes to a murder in a prison, as we read it, there is no exclusion of "an extremely narrow category of homicide", such as murder of a police officer engaged in the performance of his duties. The specific footnote example, *supra,* is, in our view, just that—an example, without limitation or exclusion of another "extremely narrow category of homicide."

The plurality opinion in *Woodson, supra,* at pp. 954-955, n. 25, further amplified upon the example given in footnote 7 as follows:

> "The only category of mandatory death sentence statutes that appears to have had any relevance to the actual administration of the death penalty in the years preceding Furman concerned the crimes of murder or assault with a deadly weapon by a life-term prisoner. Statutes of this type apparently existed in five States in 1964. In 1970, only five of the more than 550 prisoners under death sentence across the country had been sentenced under a mandatory death penalty statute. Those prisoners had all been convicted under the California statute applicable to assaults by life-term prisoners. *We have no occasion in this case to examine the constitutionality of mandatory death sentence statutes applicable to prisoners serving life sentences."* (Citations omitted, Emphasis added)

Similarly, in *Roberts* v. *Louisiana, supra,* at p. 982, n. 9, there is language, in our view, to the effect that certain specific categories of mandatory death sentence can be constitutional. The court said:

> "Only the third category of the Louisiana first-degree murder statute, covering intentional killing by a person previously convicted of an unrelated murder, defines the capital crime at least in significant part in terms of the character or record of the individual offender. *Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify said laws . . ."* (Citations omitted—emphasis added)

The intention of the plurality to not vitiate every mandatory death penalty category was briefly alluded to by Justice Rehnquist in his *Woodson* dissent (p. 971) wherein

he contrasted Part III-A with Part III-C of the plurality opinion.

Important in the *Roberts* dissent is Justice White's view of whether the plurality intended to invalidate all mandatory death penalty categories. His answer is consistent with the Attorney General's instant position. The plurality really did not so intend, the Justice saying:

> "Although the plurality seemingly makes an unlimited pronouncement, it actually stops short in invalidating any statute making death the required punishment for any crime whatsoever. *Apparently there are some crimes for which the plurality in its infinite wisdom will permit the State to require the death sentence to be imposed without the additional procedures* which its opinion seems to mandate. There have always been mandatory death penalties for at least some crimes, and the legislatures of at least two States have now again embraced this approach in order to serve what they deem to be their own penological goals." (*Roberts, supra,* at p. 996—Emphasis added)

We can only surmise (rightly or wrongly), the reason for this Court's summary dispositions on July 6, 1976 of three specific police murder cases (*Sparks, supra* from North Carolina; *Washington, supra,* from Louisiana; *Green, supra,* from Oklahoma), amongst the host of other murder cases summarily vacated that day, was because of the Court's generic overview of the very broad particular statutes before it. There is no indication in the Court's summary dispositions that it analyzed in depth the three cases involving the murdered policemen as it had done with respect to *Woodson* and *Roberts.* A logical answer is that those three cases, amongst many, were vacated as incident to the Court's striking entire, particular and specific statutes.

A fortiori, it logically follows that if this Court really intended to strike every mandatory death penalty category, including those proscribing the killing of police officers, it would have found no need (45 U.S.L.W. 3399, Nov. 30, 1976) to grant certiorari to Harry Roberts, herein (No. 76-5206) and limit the grant therein to the question:

> "Whether the imposition and carrying out of the sentence of death for the crime of first degree murder of a police officer under the law of Louisiana violates the Eighth and Fourteenth Amendments to the Constitution of the United States."

Accordingly, it seems this Court is specifically examining, the constitutionality of mandatory death sentences for first-degree murder of a police officer ". . . an extremely narrow category of homicide" which "presents a unique problem that may justify such a law."

2. The Recent New York experience bearing on the Issue

The present §§ 125.27 and 60.06 of the Penal Law, *supra* (L. 1974, c. 367) were New York's Legislature answer to the dilemma created by *Furman* as applied in *Fitzpatrick, supra*. The Practice Commentary by Hechtman, under § 60.06, *supra* (p. 160, McKinney's New York Penal Law, Book 39), in part, advises that:

> "T' is section was newly added as part of the revision of the penalties for the crime of murder. . . . That crime has been split into two degrees (§§ 125.25 and 125.27) with the first degree (§ 125.27) carrying the mandatory death penalty. . . .
>
> The instant amendment, therefore, in *mandating the death penalty* for those convicted of murder under prescribed circumstances seeks to follow what is perceived as a constitutionally acceptable course...." (Emphasis added)

This new statutory scheme was not lightly arrived at. In his letter of May 14, 1974 to the Governor's counsel concerning A. 11474-A (Senate Reprint 21028), Assemblyman Volker, one of the Bill's many sponsors, sought to give ". . . the benefit of some of the bakcground research which went into the preparation of this legislation." Volker advised that:

> ". . . (I)n December 1973, the Assembly Codes Committee held a well-attended public hearing on the issue of capital punishment. After examination of the testimony given and other supplementary materials, it was determined that the surest method to provide New York State with a constitutional death penalty was to provide a mandatory death sentence for specific and carefully defined cases. This would establish a legislative determination that these crimes could only be deterred by the death penalty. The alternative was to provide specific and detailed standards for juries to follow in determining whether a death sentence should be imposed. This approach was rejected as one which would not in fact eliminate the capricious, wanton and freakish imposition of the penalty which was the basis for Justices Stewart's and White's opinions in the *Furman* case. It was felt that detailing mitigating circumstances such as impaired capacity to appreciate wrongfulness of conduct, substantial duress and minor participation, or aggravated circumstances such as prior convictions, commission in a heinous, cruel or depraved manner, would merely give the jury the opportunity to exercise the same broad discretion they now exercise with none of these sentencing criteria set forth in the law . . . ." (N.Y. State Legislative Library, Bill Jacket 11474-A, SR-21028, document numbered pp. 51-53).

After explaining the provisions and theory of the bill (including the affirmative defenses thereto) and the various sections thereof, the letter concluded, saying:

> "I believe that enactment of this legislation is at least a partial answer to the continuing spread of violent crime in the State of New York. I also feel that the death penalty will serve as a *deterrent in the carefully limited situations which are set forth in the bill* . . . ." (Emphasis added)

Further indication of the basis for the restoration of the death penalty by New York can be found in the slip opinion of Justice McQuillan in *People* v. *Velez, supra* (See: pp.25-30). At pp. 26-27, former Governor Rockefeller is quoted as saying on June 20, 1973:

> "I am deeply concerned that the *deterrent provided by the death penalty for the murder of peace officers* . . . has been undermined by a recent decision of the State Court of Appeals which in effect nullified this State law. In the *interests of deterring such crimes* it is vital that the death penalty be retained in such cases. This decision was based on an interpretation by the State Court of Appeals of a U.S. Supreme Court decision, holding that the discretion permitted under State law as to application of the death penalty rendered it a cruel and unusual punishment. I have been advised that the issue arising from the Court of Appeals decision is expected to be carried on appeal to the U.S. Supreme Court. If the Nation's highest court reverses the Appeals Court decision, no further action will be necessary. If, however, the Supreme Court upholds the State Court, I plan to offer legislation at the next session of the Legislature which would eliminate the discretionary nature of the death penalty and thus restore the penalty as to the murder of peace officers and prison guards." (Emphasis added)

Additional reasons for the adoption of the New York 1974 Death Penalty Statute, *supra*, are set forth at pp. 27-

29 of the *Velez* slip opinion, which, after setting forth the denial of certiorari on November 12, 1973 in *Fitzpatrick*, stated:

> ". . . (A) week later, a commentator made this observation: Proponents of capital punishment now contend that the capricious quality in the law was the fact that the death penalty was optional. But make it mandatory to execute police murders and it will pass constitutional muster, they say, as they prepare to launch their campaign next month at a legislative hearing (Clines, Death Penalty—seeking a Reprive in Albany, The New York Times, November 18, 1973).
>
> In December, 1973 the Assembly Codes Committee held hearings on death penalty proposals (see New York Law Journal, December 7, 1973; see The New York Times, December 9, 1973, 'Hearing is Held on Death Penalty': '[A] number of lawmakers have expressed the view that it was the optional, and therefore inherently arbitrary nature of the death penalty that the courts objected to, and that if capital punishment were mandatory for certain kinds of murder the penalty would be found constitutional . . . Governor Rockefeller has said he would sign a bill making capital punishment mandatory for the murder of peace officers). . . .
>
> ". . . (A) committee of the state attorneys general organization reported last December that it considered 'a mandatory death penalty for specified offenses' as the alternative most likely to 'withstand constitutional attack.'"

Prior to *Furman, supra* and the 1974 revision of the New York Death Penalty, New York, in 1965 and 1966 had limited the possible imposition of the death penalty to intentional killings of peace officers, or where the killer had been serving a life sentence. The killing of a peace

officer in the course of a felony was also included in that category.

After the 1967 revision of New York Penal Law which continued the basic categories of murder which could be punishable by death, one amendment, *inter alia,* was made thereto.

A 1971 amendment (L. 1971, c. 1205) to the former Penal Law enlarged the category of murders subject to the death penalty after a bifurcated sentence proceeding. The amendment added that if ". . . the victim was an employee of a local jail, penitentiary or correctional institution performing his official duties . . .," the court should conduct the bifurcated sentence proceeding.

Interestingly, the legislative bill jacket (L. 1971, c. 1205) pertaining to this amendment and on file at the N.Y. State Legislative Library (Document No. 2-3, Assembly Bill 750-c), contains *inter alia,* a letter from its sponsor, Assemblyman Riford, dated June 17, 1971, to Governor's counsel. It stated, in part:

> ". . . (t)he reason for this bill was brought out in the disturbance at the Auburn Correctional Facility on November 4, 1970. A number of hostages were taken by the inmates, some civilian and some guards. The inmates made known their knowledge that if a guard was killed the murderer could receive the death penalty, but if they killed a civilian the maximum penalty was life imprisonment. . . ."

Continuing, the letter further indicated it was the Assemblyman's belief "that the existing law is a clear invitation to an inmate who is disposed to kill. . . ." Concluding, it set forth:

> "The civilian employees, the teachers, clergymen and others serving the facility, *are in the same hazard situation as the guards.* They deserve the same

protection under the law that the guards are afforded. . . .'' (Emphasis added).

Agreeing with these thoughts, Counsel to the Department of Correctional Services, by letter dated June 24, 1971 (also contained in said jacket and marked document #4) recommended approval of the bill, stating, *inter alia:*

> ''This is a good bill. There should be no distinction made between uniformed personnel and civilian employees in correctional institutions. *Both groups are exposed and equally susceptible to violence and possible death.* While the present law *protects* the peace officer, it leaves the civilian employee unprotected and vulnerable to injury or death. Such persons might easily be held as hostages, or become victims of violence or death in a correctional setting.'' (Emphasis added)

Of equal relevance to the instant case are other documents which led to the enactment of the predecessor murder statutes in New York and which protected the likes of policemen and correctional employees.

Thus, contained in Legislative Document No. 25 (1965) (''Fourth Interim Report of the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code—February 1, 1965'') is a ''Special Report on Capital Punishment'' (pp. 63-100). Within that Special Report is a two page majority statement recommending the abolition of capital punishment and a nine page minority report (pp. 71-78) together with a staff report and twenty-one page appendix, the minority recommending its retention, at least in part.

However, of importance are many comments and statistics contained within the minority and staff reports, *supra.* A few of these comments say that: 1. ''(t)here is more crime in the State of New York than anywhere else in the world'' (p. 75, *supra*); 2. ''(A)t a time when, by all accounts, the state is constantly losing ground in the war against crime in the streets, it would seem not only wise but absolutely necessary to focus our concern not so much on the criminal who refuses to recognize the sanctity of human life but on the law enforcement officials whose duty it is to protect life and in the overriding question of the protection of society itself'' (id.).

Also important are remarks in that Staff Report (at pp. 89-90) regarding the opinion of a vast majority of police officers ''. . . that the death penalty is the only effective deterrent to homicide in general and to the killing of police in particular.'' The report then quoted testimony given at a Public hearing in which the witness declared:

> '' 'I can report to you that those who have had actual contact with homicides and potential homicides do believe that there is a deterrent effect, and they don't base this on any statistical consideration at all. They base it purely on private interviews with criminals and potential criminals who have reported this to them.' ''

In the same vein, and most importantly are telling comments by the International Conference of Police Associations in support of New York's Current Law.

There is found in the 1974 Bill Jacket in the Legislative Library File (marked numbers 56 through 58) a memorandum in support of the adoption of the Bill by the International Conference of Police Associations. That memorandum, not only pointed out the frightening statistical increase in crimes effecting human life, but stated, in part:

> ''. . . the same statistics show us the horrible off shoot of such a breakdown in the morals of our society. *In 1966, 57 police officers were killed in the performance of their duties; in 1967, there were 76; 1968, 64; 1969, 86; 1970, 100; 1971, 126; 1972, 112; and in*

1973, 134. As you can see, the number of police officers killed in the performance of their duty has more than doubled in the last eight years. . . ." (Emphasis added)

". . . (t)he primary duty of the policeman is enforcement of laws enacted by you as legislators. In that role, the police walk constantly among criminals some of whom are chronic repeaters and some of whom are the toughest, most hardened miscreants in our society. Police officers . . . know, from the synthesis of their total experience, that lurking behind even the toughest facade is often a deep seated fear of that terrifying punishment and they know that sometimes the specter of that fear will stay a trigger finger at the critical moment. . . ." (id).

". . .(t)hink of the correctional officers who have been killed in the riots inside our penitentiaries, killed by murders who were sentenced to jail rather than the gas chamber or electric chair . . . ." (id).

This memorandum, while commenting upon critics who opposed the death penalty in the past, theorized that the lack of concern for a murdered policeman was wrongfully excused by those opponents who rationalized this was part of the policeman's job. "What they fail to take into consideration is their responsibility to do everything possible to make the job of being a policeman as safe as they possibly can. They worry about families of the killer, but shed no tears for the families of the dead officer." (id).

Thus, New York, like other states has shown a deep and continuing concern for the police officer and correctional person in order to offset the effect upon society which takes place when such officers or personnel are killed in the line of duty.

We submit a legislature, through its continued inclusion of the police (peace) officer in the class of those whose

murders could trigger the mandatory death penalty, evinces great rationality in providing for the ultimate punishment of the perpetrators. It could validly consider that the police (peace) officer is the *symbol* of our organized and civilized society and the bulwark holding the front line against the forces of anarchy and lawlessness.

It could also evaluate the facts that no one in our society could lay greater claim to being the protector of society than the policeman; that law enforcement groups and agencies are daily concerned with and exposed to the everyday problems in the constant war against crime.

3. The Mandatory Death Penalty for the Murder of a Police Officer is Constitutionally valid

In the Attorney General's view, the "narrow category" of the killing of a police officer engaged in his duties also presents a "unique problem that may justify such a law." And, as will be seen, *infra,* because of circumstances or the specific language within a statutory scheme it can be deduced that a finding of guilt of first-degree murder for the killing of a police officer implicitly indicates the consideration of at least one mitigating factor.

The clearest and possibly easiest, example of such characterizations, is the "lifer" who kills a correctional person. As some of the members of the Court have indicated in *Woodson,* and *Roberts, supra,* this is considered both a "narrow category" of homicide and depicts a "unique problem" which may very well justify the mandatory law. Some of the reasons given for this view include, without limitation, the fact that such a crime, by its description and definition, demonstrates the character or record of the perpetrator.

What is not there stressed or said about that "narrow category" are the obvious facts that the protection of the correctional officers and the deterrence of such crimes are absolute musts. Without such considerations, and manda-

tory penalty, the miscreant felons of society could kill anyone at will, never having to fear the infliction of the death penalty, or the imposition of any, additional or significant punishment.

Equally narrow a category of homicide and also presenting a "unique problem" is the situation concerning the police officer. Like the correctional person, he, too, is vulnerable and exposed to violence and possible death, we daresay, even more so. The difference between the policeman and the correctional guard in this regard is the setting in which the policeman works (vis-a-vis the correctional employee). The officer is exposed to the many uncontrolled hazards of external society (as opposed to a controlled environmental society) and it logically seems that he, as the very essence and symbol of an organized society is more of a visible target than a correctional person.

We need only point to the special regard the New York Legislative and Executive Branches have held for the police officer and correction person since, at least 1965, *supra,* by carving out for them special protective status in the application of the homicide laws. This "unique" concept came about and has continued because of the recognition of many diverse factors.

Especially, demonstrative of this *uniqueness* is the memorandum of the International Conference of Police Associations referred to and quoted, in part, *supra.*

The very fact that a person kills a policeman on duty when he knows or should know the officer is a policeman, is a great indicator of the *perpetrator's character, or lack of it,* we should say. Such an act, surely on its face, constitutes one of the most egregious *aggravating* factors one could find or think of. Such a consideration constitutes a proper basis for a legislative finding that a person who so acts is of a *character* that *mandates* the imposition of the *death* penalty.

The only slight difference, as we see it, between the murder of a policeman and the other two narrow categories is the former situation does not on its face bespeak the record of the offender, which, because of the factors set forth, *supra,* should not be absolutely controlling. The act is aggravating and bespeaks the perpetrator's malevolent character.

For example, as we read § 125.27, *supra,* there is built into the statute several mitigating factors. The most obvious of which is that a youth, under 18, can not commit the crime of murder in the first degree, and hence, is not subject to the death penalty. (Contrast this to New York's general rule that youths 16 and over, per Penal Law § 30.00, may be treated as adults for criminal law purposes).

Also built in to the New York overall scheme are opportunities to present recognized defenses as well as the § 125.27 affirmative defenses (i.e., justification, insanity, intoxication PL §§ 30.05; 35.00 et seq.; 15.25). If presented, and the jury's verdict, still returns "guilty", there is obvious indication the jury considered mitigating circumstances, has rejected them and, implicit in the verdict, has found beyond a reasonable doubt, the guilt of the accused and at least *one aggravating factor.*

The fact that in Georgia, the evidence considered at the Guilt stage can suffice, without any resubmission to the sentencing authority (*Gregg* v. *Georgia, supra,* 49 L. Ed. 2d at p. 869) seems most consistent with our argument that in New York, in Louisiana, and maybe elsewhere, evidence of the aggravating or mitigating circumstances is built into the statutes defining murder, first-degree and in other complementary procedural provisions; and, a finding of guilty of first degree murder by the jury implies their consideration of such factors.

We still find possibilities for a Georgia jury to "waffle" on the sentencing issue. The jury need not recommend

death, even though it may have found at least one of the ten statutory aggravating factors. So too, it is not required to find a mitigating circumstance in order to recommend mercy to the Court. The only positive requirement is that it find one statutory aggravating factor in order to recommend death (*Gregg, supra* at p. 188).

Such a constitutionally upheld system seems not to comport with the concerns of the *Furman* plurality, whereas a "narrow" mandatory scheme (regarding the killing of policemen) certainly appears to have almost all other constitutional virtues applauded in this Court's decisions without the many pitfalls or unconstitutional vices therein stated.

Like Georgia, Florida and Texas, Louisiana's and New York's narrow and "unique" Penal Law categories, *supra,* certainly focus attention on the particularized nature of the crime as well as upon the character of the defendant.

When compared to the broad groupings of homicides and the infinite variables of their perpetration and perpetrators in other states, New York's and Louisiana's statutes, by narrowing their group to such *special* and *unique* categories, *supra,* meets the Constitutional requirements set forth by this Court.

To be sure, it is clear this Court has yet to rule that every category of killing a policeman is not so *unique* and, therefore within the condemnation of a broad mandatory system. It also is fair to say this court has indicated that a category, which includes the murder of a correctional employee by a life termer, is *unique* and may justify a mandatory penalty. Since, in our view, *supra,* there is very little difference between that category and the police murder category (at most, a slight degree, if any), such a latter category is also *unique, special* and constitutionally sufficient to justify a mandatory death penalty.

Thus, some of the comments and statements set forth, *supra,* pertaining to the protective needs of correctional personnel could also apply with equal force to police officers. Thus, their exposure and vulnerability is also a rational consideration for the imposition of the mandatory death penalty.

Your *amicus* is aware that a plurality of this Court has indicated a preference for a bifurcated system, in the latter part of which a sentencing authority would consider aggravating and mitigating circumstances surrounding the commission of crimes punishable by death. While this Court may have considered that many murders have been committed because of varying extenuating circumstances, and, therefore, should be considered by a sentencing authority, the Attorney General respectfully submits, for the reasons set forth, *supra,* that these considerations do not and should not apply to the murder of a police officer who, as the symbol of a lawful society, is deserving of its protection. Where a statutory scheme defining this crime deems and thereby incorporates the aggravating nature and factor of such a killing, as well as at least one mitigating factor for consideration on the issue of guilt, the difference between the killing of a police officer, on its face and a different homicide is obvious. Those mitigating concerns, *supra,* realistically are not involved in such a heinous and wanton act.

Accordingly the Louisiana and New York Laws imposing a mandatory death penalty for killing of a police officer (murder-first degree) do not violate the Eighth and Fourteenth Amendments.

CONCLUSION

The imposition and carrying out of a mandatory sentence of death for the crime of first degree murder of a police officer under the Law of Louisiana is non-violative of the Eighth and Fourteenth Amendments to the Constitution of the United States.

Dated: New York, New York
February 15, 1977

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5206

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HARRY ROBERTS,

Petitioner,

vs.

LOUISIANA,

Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The State of California files this Amicus Brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States.

On November 29, 1976, this Honorable Court issued the following order:

> "76-5206 Roberts v. Louisiana. Petition for a writ of certiorari having been granted on November 8, 1976, grant hereby limited to the following question:

> " 'Whether the imposition and carrying out of the sentence of death for the crime of first-degree murder of a police officer under the law of Louisiana violates the Eighth and Fourteenth Amendments to the Constitution of the United States.' " 97 S.Ct. 482 (1976).

On December 7, 1976, the California Supreme Court in *Rockwell v. Superior Court*, 18 Cal.3d 420, 134 Cal. Rptr. 650, 556 Pac. Rptr. 1101 (1976), struck down this state's special circumstance death penalty legislation as being mandatory and thus in violation of Federal standards.

In pertinent part, the special circumstances legislation in California as set forth in California Penal Code section 190.2 provides:

> "The penalty for a person found guilty of first-degree murder shall be death in any case in which the trier of fact pursuant to the further proceedings provided for in Section 190.1 makes a special finding that:
>
> " . . . .
>
> "(b) The defendant personally committed the act which caused the death of the victim and any of the following additional circumstances exist:
>
> "(1) The victim is a peace officer, as defined in Section 830.1, subdivision (a) of Section 830.2, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties."

In California, three persons are presently under a sentence of death for the first-degree murder of a peace officer by reason of the aforementioned section. (*Rockwell v. Superior Court, supra*, did not involve the murder of a peace officer.)

Amicus curiae believes that mandatory death sentences for the first-degree murder of a peace officer are not cruel and unusual punishment under the Federal Constitution and that not only in the present legislation but under future legislative enactments, the death penalty for the first-degree murder of a peace officer should be held to be constitutional.

SUMMARY OF ARGUMENT

In determining whether or not a mandatory death penalty for the first-degree murder of a police officer is constitutional, the test is not to require the Legislature to select the least severe penalty possible, nor to demonstrate a compelling state interest in the selection of that sanction. Rather, such legislative enactments are to be presumed valid. Thus, a heavy burden rests on those who would attack the judgment of the representatives of the people. With this test in mind, mandatory death sentences for the first-degree murder of peace officers must be examined as to constitutionality under the tests set forth by the plurality opinion in *Gregg v. Georgia*, 96 S.Ct. 2909 (1976). This two-prong evaluation involves examining (a) objective indicia that reflect the public attitude towards a given sanction, and (b) whether or not the penalty accords with the "dignity of man." Mandatory death sentences for first-degree murder of police officers are a sanction accepted by the general public. At the time of the common law, a distinction was made between crimes involving private citizen only, and crimes against the body politic. Originally, the death penalty was mandatory. As to those who favor mandatory death sentences, a recent poll shows that the highest number of those who favor mandatory death penalties, favor them for the murder of police officers.

In addition, since the rendering of the decision in 1972 in *Furman v. Georgia*, 408 U.S. 238 (1972), approximately 29 states out of 35 that have reenacted the death penalty created a special category of capital offense which specifies the murder of a peace officer to be either an aggravating factor,

or as in itself a crime requiring a mandatory death sentence. Mandatory death sentences for the first-degree murder of police officers do not offend the dignity of man. Such sentences satisfy both the social functions of retribution and deterrence. Concerning retribution, the people have a right to assert their moral outrage in the killing of a law enforcement officer in the line of duty by demanding a mandatory death sentence.

The interpretation of statistical data bearing on the deterrent effect of death penalties is an issue for the Legislature, which is better equipped to study that issue. It cannot be said that the legislative body of a state government is incapable of making the determination that capital sanctions may deter persons who would otherwise commit murders of peace officers acting in the line of duty. Rather, a legislature may, consistent with its powers and responsibilities, find such a deterrent effect and enact laws predicated thereon. The objections raised to general mandatory death sentences would not apply to the killing of police officers because (a) it is a very narrow category of crime and (b) the offense in itself reflects to some extent on the character of the offender.

In conclusion, it cannot be said that a mandatory death sentence for the first-degree murder of a police officer is excessive because instead of merely striking at an individual, in actuality the murderer in cold blood takes the life of an individual whose duty it is to protect society.

ARGUMENT

MANDATORY CAPITAL PUNISHMENT FOR THE FIRST-DEGREE MURDER OF A POLICE OFFICER IS NOT CRUEL AND UNUSUAL PUNISHMENT NOR IS IT VIOLATIVE OF THE FEDERAL CONSTITUTION.

A. Standards To Be Used In Determining The Constitutionality Of Mandatory Death Sentences For The First-Degree Murder Of Police Officers.

In determining the issue of whether or not mandatory death sentences for the murder of police officers are constitutional, the test is very narrow and stringent. It is not whether such penalties are advisable or that the least severe penalties are required to be selected. Instead, this clearly is a question for the Legislature to decide. The test was set forth by the plurality in *Gregg v. Georgia*, 96 S.Ct. 2909 at 2926 (1976):

> "But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators.
>
> " . . . .
>
> "Therefore, in assessing a punishment selected by a democratically-elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people."

In the same manner the plurality said in *Gregg v. Georgia, supra,* 96 S.Ct. at 2931:

> ". . . . Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state the moral consensus concerning the death penalty and its social utility

> as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe."

The test may best be evaluated by reference to the standards set forth by the plurality opinion in *Gregg* which tied the constitutional prohibition against cruel and unusual punishments to "evolving standards of decency that mark the progress of a maturing society." *Gregg v. Georgia, supra*, 96 S.Ct. at 2925. The Eighth Amendment standard is accordingly gauged by two criteria: (a) Objective indicia reflecting the public attitude towards, and acceptance of, a given sanction; and (b) Whether the penalty accords with the "dignity of man." The concept of comporting with the "dignity of man" was defined in *Gregg* to require at a minimum that the selected punishment not be excessive. *Ibid.* at 2925. It is urged that mandatory capital punishment for the first-degree murder of a police officer who was acting in the line of duty is both widely accepted and is not excessive, and accordingly is not violative of the Federal Constitution.

B. Objective Indicia Reflect That Mandatory Death Sentences For First-Degree Murders Of Police Officers Are Accepted As An Appropriate Sanction By The General Public.

In *Gregg v. Georgia, supra*, 96 S.Ct. 2926 et seq., this Court noted that the sentence of death for the crime of murder was a sanction that had been widely accepted by the general public. However, in *Woodson v. North Carolina*, 96 S.Ct. 2978, 2983-90 (1976), the plurality stated that the mandatory punishment of death was not accepted as a sanction by the general populous. Yet the plurality opinions in *Woodson* at 2985-86 n. 25, and *Roberts v. Louisiana*, 96 S.Ct. 3001, 3006, 3007, n.9 (1976) held open the issue of whether certain very narrowly drawn mandatory death sentences such as for intentional murder by a person serving a life sentence, or

by a person previously convicted of an unrelated murder, might be constitutional. It is urged that the first-degree murder of a police officer would similarly fall into a narrow category and accordingly would in fact comply with Federal standards.

As the plurality pointed out in *Woodson v. North Carolina, supra*, 96 S.Ct. at 2984, 2985, the practice under the common law and in the United States until the early nineteenth century was to make death the exclusive mandatory sentence for certain specified offenses. However, the common law also distinguished between the enormity of crime perpetrated against the body politic itself as opposed to injuries or crimes committed by private citizens against other private citizens. The epitome of this concept was seen in the law concerning high treason. As William Blackstone stated in the eighteenth century:

> "The third species of treason is, 'if a man do levy war "against our lord the king in his realm.' " And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances whether real or pretended. For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes, in the high court of parliament: neither does the constitution justify any private or particular resistance for private or particular grievances; though in case of national oppression the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people. To resist the king's forces by defending a castle against them, is a levying of war: . . . But a tumult with a view to pull down a particular house, or lay open a particular inclosure, amounts at most to a riot; this

> being no general defiance of public government. So, if two subjects quarrel and levy war against each other (in that spirit of private war, which prevailed all over Europe in the early feodal times) it is only a great riot and contempt, and no treason. Thus it happened between the earls of Hereford and Gloucester, in 20 Edw. I, who raised each a little army, and committed outrages upon each other's lands, burning hourses, attended with the loss of many lives: yet this was held to be no high treason, but only a great misdemeanor." (W. Blackstone, 4 Commentaries *81, 82.)

This is not to suggest that first-degree murder of a police officer constitutes high treason. Rather, it is clear that in the common law origins of modern law, offenses against the body politic were deemed to be more serious and of greater consequence than crimes involving private individuals because those offenses against the public at large affected the community as a whole and deprecated the lawful passageways by which grievances might be heard.

Thus, when an individual commits a first-degree murder upon a police officer who is acting in the line of duty, his acts constitute an attack upon the lawful functioning of government itself. The common law precept of harsh punishment for those who would attack the body politic by violent and deadly means is reflected today by certain objective indicia of the public attitude towards the death penalty and the first-degree murder of peace officers.

In the June 1973 Harris Survey, 41 per cent of respondents stated that all persons who killed a policeman or prison guard should get the death penalty as opposed to 17 per cent who would not impose that sanction (38 per cent were in a "depends" category and 4 per cent were in a "not sure" category). (Vidmar and Ellsworth, Public Opinion and the Death

Penalty, 26 Stanford Law Review, 1245, 1251-52.)[1] It should be noted that in the Harris Survey of June 1973, while 41 per cent of respondents favored a mandatory death penalty for all those who killed policemen or prison guards, only 28 per cent of respondents favored capital punishment for all persons committing first-degree murder. *Ibid. See also* Sarat and Vidmar, Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis, 1976 Wisconsin Law Review 171.

In *Gregg*, the plurality opinion in discussing objective indicia concerning the general public support for the death penalty for the crime of murder, noted that since *Furman* was decided in 1972, at least 35 states and the Congress of the United States had enacted legislation reinstating the death penalty. *Gregg v. Georgia, supra,* 96 S.Ct. at 2928. As the court in *Gregg* concluded:

> " . . . all of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people."

Further analysis of these statistics shows an overwhelming basis of support for more severe penalties to be imposed for the killing of law enforcement officers.

Of those 35 states listed in *Gregg v. Georgia, supra,* 96 S.Ct. at 2928, fn.23, as having reenacted a new death penalty law since *Furman v. Georgia, supra,* 408 U.S. 238 (1972), approximately 29 of these states specified the murder of a peace officer to be either an aggravating circumstance or a

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[1] The authors of the above cited article also referred to a May 1973 poll in Minnesota on the issue of mandatory death penalties which showed that 49 per cent of respondents favored "automatic" capital punishment for murder of a law enforcement officer. The authors, although they attack the reliability of that poll, conceded that " . . . these data tend to show considerable support for mandatory death sentences, . . . " *Ibid.* at 1251.

crime which *per se* called for a mandatory death penalty.[2]

Thus, it is urged that in light of common law precedent and present-day indicia of wide public support for this sanction, there should be no constitutional bar for a legislature of its own responsibility to find it necessary to enact a mandatory death sentence for the crime of first-degree murder of a police officer acting in the line of duty.

C. Mandatory Death Sentences For The First-Degree Murder Of A Police Officer Accord With The "Dignity Of Man."

The plurality opinion in *Gregg v. Georgia, supra,* 96 S.Ct. at 2925, held that for a capital penalty to pass constitutional muster under "evolving standards of decency" not only must objective indicia reflect the public attitude towards a given sanction is positive, but the penalty must also accord with the "dignity of man." In order to comport with the dignity of man, the punishment must not be "excessive." For a punishment not to be excessive in the abstract at the least, (a) the penalty must not involve the unnecessary and wanton infliction of pain and (b) the punishment must not be grossly out of proportion to the severity of the crime. *Gregg v. Georgia, supra,* 96 S.Ct. at 2925.

The plurality in *Gregg* noted at pages 2930-32, that the death penalty for the crime of murder accorded with the dignity of man because it contained social justification in that it

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2 Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Montana, Nebraska, Nevada, New York, New Hampshire, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Washington, Wyoming. (Florida and Maryland, while not specifically providing for the death penalty for police murders *per se*, do by the wording of their statutes, have for all practical purposes the same effect.) *See* citation of statutes in *Gregg v. Georgia, supra,* 96 S.Ct. at 2928, fn.23.

served two principle social purposes: "Retribution and deterrence of capital crimes for respective offenders." *Ibid.* at 2930. It is urged that consideration of these two social functions indicate that mandatory death sentences for the first-degree murder of law enforcement officers are not deprecatory to the dignity of man.

When a police officer is killed in the line of duty, the crime does not only involve the murder of a private citizen, but instead, the act also constitutes a serious disruption of the orderly processes of government. The importance of this distinction has already been discussed in terms of the common law and high treason. The moral outrage, therefore, in the first-degree murder of a law enforcement officer in the line of duty is not simply one which the relatives or friends of the victim officer must bear. Rather more importantly, the general public at large must suffer since a law enforcement officer gave his life in the course of attempting to protect society. Therefore, society has a right to demand, should it see fit, the imposition of a mandatory death penalty for the narrowly defined crime of first-degree murder of a peace officer acting in the line of duty.

The Legislature should be within its powers in imposing such sanction if it finds it necessary to impart knowledge to law enforcement that if an officer is the victim of a first-degree murder in the course of his duties, retribution will be sure and certain. What this Court stated concerning deterrence as related to the use of capital punishment for the crime of murder is equally applicable to mandatory death sentences for first-degree murder of a peace officer:

> "Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. [Footnote omitted.] The results simply have been inconclusive . . . . Although some of the studies suggest that the death penalty may not func-

> tion as a significantly greater deterrent than lesser penalties, [footnote omitted] there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no effect. But for many others, the death penalty undoubtedly is a significant deterrent." *Gregg v. Georgia, supra,* 96 S.Ct. at 2930, 2931.

It is respectfully urged that a state legislature is well within its powers if it finds that the imposition of a mandatory death penalty is necessary to deter those who would murder peace officers who are acting in the line of duty.[3]

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[3] In *The Death Penalty in America*, 284-315 (H. Bedeau, Ed., 1967) there are printed certain studies conducted over 20 years ago. It was granted by the various authors in the articles describing these studies that there is no greater deterrent effect for the use of the death penalty as relates to peace officers and non-peace officers. However, these studies are subject to great doubt not only because of their age but because different regions, whether it be state, counties or cities, have different problems in the area of crimes and law enforcement. As such, the question of the deterrent effect of the death penalty must be viewed not so much on a national basis but instead, should be a question for the legislature in each state to decide.

Of equal relevance to the legislative function as the statistical report above mentioned, is the circumstance described by Justice McComb in his dissenting opinion in *People v. Love,* 56 Cal.2d 720, 736, 16 Cal. Rptr. 777, 366 P.2d 33 (1961), *overruled on another point* in *People v. Morse,* 60 Cal.2d 631, 649, 36 Cal. Rptr. 201, 388 P.2d 33 (1964). In that dissenting opinion Justice McComb related an incident taken from the records on file in the Los Angeles Police Department:

> "(vii) Salvador A. Estrada, a 19-year-old youth with a four-year criminal record, was arrested on February 2, 1960, just after he had stolen an automobile from a parking lot by wiring around the ignition switch. As he was being booked at the station, he stated to the arresting officers: 'I want to ask you one question, do you think they will repeal the capital punishment law. If they do, we can kill all you cops and judges without worrying about it.' "

There is greater reason for mandatory death sentences for first-degree murder of peace officers acting in the line of duty than in other cases. When an individual has been legally arrested by the police, he may hesitate before attempting to escape or engaging in a gun battle with the police if he knows that upon conviction of first-degree murder of a police officer he will get certain death. The strong probability exists therefore that a mandatory death penalty for first-degree murder of a peace officer in the line of duty is a vehicle for saving lives. The prevention of at least some individuals from attempting to escape from police or engaging in gun battles should be sufficient reason alone to posit a deterrent effect of the death penalty in such cases.[4]

Concededly, not all individuals will be deterred from engaging in gun battles or attempting to escape from the authorities simply due to the existence of the death penalty even if the penalty is mandatory. However, that is not the applicable test: Instead, as the Court noted in *Gregg, supra,* there are categories of crime where imposition of the death penalty is undoubtedly a significant deterrent. *Gregg v. Georgia, supra,*

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[4] A study prepared by the Uniform Crime Reporting Program of the Federal Bureau of Investigation, "Law Enforcement Officers Killed, Summary 1975," indicates that in calendar year 1975, 129 local, state and federal law enforcement officers were feloniously killed in the United States and territories; the comparable total was 132 in 1974. *Ibid.* at p. 1.

The Uniform Crime Reports – 1974, indicates at p. 232 that for the period of 1965 to 1974, 947 officers were slain in the line of duty.

Clearly the crime of first-degree murder of a peace officer acting in the line of duty is sufficiently severe in its very nature for a legislature to impose the sanction it finds necessary to prevent those who would commit it.

96 S.Ct. at 2931. Thus, it is urged that if a legislature, after analyzing all of the relevant factors, determines that a mandatory death sentence would be a more deterring penalty than would be a discretionary death penalty or some other sanction for first-degree murder of a peace officer, that determination should be constitutionally viable so that the people through their lawmakers may mandate what is in their considered opinion added extra protection to law enforcement.

In addition, the three constitutional defects discussed by the plurality opinion in *Woodson v. North Carolina, supra,* 96 S.Ct. 2978, 2983-91, concerning the mandatory death statutes in that state are not applicable to the narrowly-drawn legislation setting forth mandatory capital punishment for the first-degree murder of peace officers acting in the line of duty.[5]

The plurality noted in *Woodson* that mandatory statutes are deficient because jurors might be deterred from rendering guilty verdicts of first-degree murder because of the enormity of the sentence automatically imposed. Also, as the court noted in *Woodson*:

> " . . . North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences." *Ibid.* at 2991.

Therefore, the plurality opinion stated there was total arbitrariness in sentencing and there was no method for the judiciary to check the arbitrary and capricious exercise of the jury's power in deciding the issue of life and death. *Woodson v. North Carolina, supra,* 96 S.Ct. at 2990, 2991. However, it is urged that such is not necessarily the case in very carefully and narrowly drawn mandatory death penalties. The plurality opinions both in *Woodson* and in *Roberts* held open the question of the constitutionality of mandatory death sentences for narrowly defined offenses such as intentional murder by persons serving a life sentence or by persons previously convicted of an unrelated murder. *Woodson v. North Carolina, supra,* 96 S.Ct. at 2985, 2986 n.25; *Roberts v. Louisiana, supra,* 96 S.Ct. at 3006, 3007, n.9.

It is submitted that a first-degree murder statute requiring death for the murder of a peace officer acting in the line of duty is extremely narrow in both the subject Louisiana legislation at the time petitioner was sentenced to death, and in California. In Louisiana (*see* Louisiana Revised Statutes Annotated, § 14:30 (1974)), first-degree murder was defined[6] as it related to the killing of a peace officer as follows:

> "First-degree murder. First-degree murder is the killing of a human being: . . . (2) when the offender has the specific intent to kill and inflict great bodily harm upon a fireman or a peace officer who is engaged in the performance of his lawful duties . . . . "

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5 The first constitutional objection identified by the Couurt as to mandatory death sentences related to whether or not mandatory death sentences were an accepted sanction by the general public. *Woodson v. North Carolina, supra,* 96 S.Ct. at 2983-90. However, as has already been discussed, objective indicia demonstrate acceptance of mandatory death sentences for the first-degree murder of police officers by the general public.

6 As petitioner points out, the Louisiana Legislature has subsequently amended its capital punishment statute. (Pet. Op. Br. pp. 18, 27.)

In California, before a defendant may be sentenced to die for the killing of a peace officer, he must first be found guilty of first-degree murder. First-degree murder is defined in California Penal Code section 189, as follows:

> "All murder which is perpetrated by means of a destructive device or explosive poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree."

In California, the penalty phase is separated from the guilt phase and does not come into play until the defendant has first been convicted of first-degree murder. (Cal. Pen. Code § 190.1.) For the killing of a peace officer, a defendant can only be sentenced to die if after being found guilty of first-degree murder, the court or jury in the second and separate bifurcated hearing finds true that the defendant personally committed the act which caused the death of the victim (Cal. Pen. Code § 190.2(b)) and that:

> "(1) The victim is a peace officer [as defined in the California Penal Code] who, while engaged in the performance of his duty, was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties." (*Ibid.*, section 190.2(b)(1).)

As such, the statutes are very narrowly drawn both in Louisiana and in California.

In the aforementioned Louisiana statutes, before the death penalty could have been imposed, the defendant must be found to have had the specific intent to kill and inflict great bodily harm upon a peace officer who was engaged in

the performance of his lawful duties. In California, before a defendant may be given the death penalty for the killing of a peace officer, he must first be found guilty of first-degree murder as defined by stringent standards. In a separate hearing, the jury or judge must determine whether or not the defendant personally committed the act, whether or not the peace officer was intentionally killed, whether or not the peace officer was engaged in the performance of his duty, *and* whether or not the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of his duties. Thus, both the Louisiana and California statutes are narrowly drawn in order to define the specific offense, and to further a definite social purpose. It is, therefore, unlikely in either of the above statutory approaches that there will be freakish or arbitrary imposition of the death penalty in light of the narrow ambit of the statutes.

In *Woodson*, the plurality opinion said that a third constitutional shortcoming of mandatory death statutes is the failure to allow a particularized consideration of relevant aspects of the character or record of the convicted defendant before imposition of a sentence of death. *Woodson v. North Carolina, supra*, 96 S.Ct. at 2991. However, the plurality opinion in *Roberts v. Louisiana, supra,* 96 S.Ct. 3006, 3007, n.9, stated that certain narrowly drawn capital crimes were defined in significant part in terms of the character or record of the individual offender and as such, such laws might be justified.[7]

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[7] In that same footnote 9, the Court mentions that the third category of first-degree murder in the Louisiana statute, concerning intentional killings by persons serving a life sentence, or by a person previously convicted of an unrelated murder, define a capital crime at least in significant part in terms of the character or record of the individual offender; reference to the killing of peace officers is not made. However, by reason of the limited grant of certiorari in the instant case and the question thereby posed, it appears that this proposition is being considered by this Court.

Under the narrowly drawn statutes of Louisiana and California, the offense of murder of a peace officer is by the very terms of the statutes defined so as to comprise the character of the offender as well as the egregiousness of the offense. The fact that in both California and Louisiana a jury must determine whether or not the murderer *intended* to kill a peace officer engaged in the performance of his lawful duties would in itself demand to a significant degree, analysis of character of the offender. This is so because the jury, in determining whether or not a defendant intentionally killed a peace officer under the law of Louisiana or California, must find not only that the defendant had a callous disregard for human life but also, must by implication find that the defendant had a total disregard for the lawful processes of a democratic government. Thus, resolution of the criminal intent necessary in both Louisiana and California, operates to define to a great degree, the character of the murderer himself.

Thus, it is submitted that narrowly drawn mandatory capital statutes for the first-degree murder of police officers do not carry the same vices discussed by the plurality opinion in *Woodson* concerning mandatory death statutes in general.

Finally, it must be considered whether or not the mandatory punishment of death is disproportionate in relation to the crime for which it is imposed; namely, the first-degree murder of a peace officer engaged in the line of duty. In *Gregg v. Georgia, supra,* 96 S.Ct. at 2909, 2931, 2932, the plurality opinion stated that imposition of capital punishment for the crime of murder when a life has been taken deliberately by the offender cannot be said to be invariably disproportionate to the crime. In the same manner, mandatory death sentences for the first-degree murder of peace officers as defined under the statutes of both Louisiana and California are not disproportionate to the crime because by the act of the offender the constitutional processes of a democratic government have been violently attacked and distorted. As such, it is urged that this analysis establishes a meaningful distinction

between the narrowly defined crime of first-degree murder of a peace officer, and other first-degree murders, and accordingly imposition of a mandatory death sentence for the former offense is neither disproportionate nor beyond the power of a state legislature to enact.

In a recent case, in which the Canadian Supreme Court rejected a contention that the mandatory imposition of the death penalty for the murder of a police officer constituted cruel and unusual punishment as defined by the Canadian Bill of Rights,[8] Chief Justice Laskin observed in a concurring opinion:

> "It is certainly arguable that the mandatory death penalty, considered as mere vengeance, should be regarded as cruel and unusual punishment within s.2(b), having regard to its enormity and its reversibility, its incompatibility with any aim of rehabilitation and its physical and mental pain. I do not think, however, that it can be said that Parliament, in limiting the mandatory death penalty to the murder of policemen and prison guards, had only vengeance in view. There was obviously the consideration that persons in such special positions would have a sense of protection by reason of the grave penalty that would follow their murder and, further, that the mandatory penalty would be, to some extent at least, a deterrent as, for example, to a prison inmate already serving a life sentence but tempted to escape even if this meant committing murder. It was open to Parliament to act on these additional considerations in limiting the mandatory death penalty as it did, and I am unable to say that

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8 While the Canadian Parliament had repealed the death penalty during the pendency of the appeal, the Canadian Supreme Court nevertheless reached the Bill of Rights contention in its opinion.

they were not acted upon. On this view, I cannot find that there was no social purpose served by the mandatory death penalty so as to make it offensive to s.2(b).

"The appellants sought to strengthen their position by invoking the public conscience or public morality as reflecting a revulsion against capital punishment. No doubt, this is a strongly held position by an undetermined section of the public so far as the death penalty in general is concerned but the issue is not so free of debate as to enable me to say that the moral position is clear. Indeed, I can, I believe, properly take judicial notice of the fact that there is a substantial opinion that the imposition of the death penalty for the murder of policemen or prison guards is neither shocking nor abhorrent. This is adequate ground for being wary about interfering with a legislative policy that prescribes the death penalty in such cases." *Miller and Cockriell v. The Queen*, ____ D.L.R. 3d____, concurring opinion at pp. 17-18; judgment pronounced October 5, 1976.

The concurring opinion also recognized that the crime of murder of a police officer is itself a very narrowly defined crime for which the mandatory imposition of the death penalty is appropriate:

> "Since we are concerned here with a situation where the death penalty is mandatory, I need not embark on any consideration of questions of uneven application of authorized punishments or questions of discretionary, arbitrary or capricious application of the death penalty. It cannot be argued that arbitrarinous of capriciousness resides in the limitation of the death penalty to the murder of policemen and prison guards, persons who are specially entrusted with the enforcement of the criminal law and with the custody and supervision of convicted persons. The progressive restriction of the situations in which the death penalty could be imposed in this country . . . , does not point to an erratic imposition when it was mandatory in the narrow classes of cases for which it was authorized." *Ibid*; concurring opinion at pp. 8-9.

While Canada has standards pertaining to criminal justice not necessarily identical to our own federal constitutional standards, amicus curiae respectfully submits that the reasoning of the Canadian Supreme Court lends support to the thesis that a legislature may, consistent with its obligations, mandate a penalty of death for a narrowly defined grievous crime which necessarily involves a serious disruption of the orderly processes of a democratic society.

CONCLUSION

The question involved in this case is not whether a legislature *should*, but instead whether or not a legislative body *may* enact mandatory death penalty legislation for the first-degree murders of police officers. It has been shown that mandatory death sentences under these limited circumstances are a sanction accepted by the general public which accords with the dignity of man. Thus, if a legislature finds that it can better protect its law enforcement officers by use of mandatory capital statutes which are narrowly drawn, it should be permitted to so enact. For, as the plurality opinion stated in *Gregg v. Georgia, supra*, 96 S.Ct. at 2926:

> "Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people."

For these reasons, amicus curiae, the People of the State of California, joins respondent, the State of Louisiana, in its assertion that mandatory death penalties for the first-degree murder of a peace officer are not violative of the Federal Constitution.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-5206

HARRY ROBERTS,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

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Americans for Effective Law Enforcement, Inc.; the International Association of Chiefs of Police, Inc.; the National District Attorneys Association, Inc.; and the National Sheriffs' Association Inc. respectfully move this court for leave to file a brief, *amici curiae,* in support of the respondent in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. Counsel for the respondent, State of Louisiana, by its attorney, the District Attorney of Orleans Parish, New Orleans, Louisiana, has consented in writing to our filing; the

petitioner, Harry Roberts, by his attorney, Garland R. Rolling, has refused to consent to our filing. Accordingly, we move this Court directly for leave to file. Letters from counsel for the petitioner and respondent have been filed with the Clerk of this Court. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law;
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens;
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The International Association of Chiefs of Police, Inc. (IACP) is a not-for-profit professional association and represents over 7,000 chiefs and top executives of American police departments and other law enforcement agencies in all 50 states and in 57 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage

adherence of all police officers to high professional standards of performance and conduct.

The IACP Legal Officers' Section is the only nationally organized body of police legal advisors. They serve as house counsel to approximately 300 law enforcement agencies representing more than half of the police officers and sheriff's deputies in the United States. The majority of them actively participate in section activities.

The National District Attorneys Association, Inc. (NDAA) is a not-for-profit, non-political, tax exempt corporation composed of approximately 6,000 members representing all 50 states. The purposes of the NDAA are, *inter alia*, to improve and facilitate the administration of justice in the United States and to promote the study of law and legal institutions.

To effectuate these aims, the NDAA for many years has utilized an *Amicus Curiae* Committee to file briefs in cases of national importance in the United States Supreme Court. The NDAA seeks to make known the views of all prosecutors in the United States and to bring before this Court their positions on matters affecting the discharge of the duties of the prosecutor.

The National Sheriffs' Association is a not-for-profit, professional organization with nearly 37 years of progressive assistance to federal, state, and local law enforcement, courts, corrections, and other criminal justice agencies. Its more than 53,000 members in all states and several foreign nations include not only the more than 3,000 sheriffs of America but also encompass other criminal justice administrators and practitioners at virtually every level of jurisdiction.

The NSA conducts, frequently in conjunction with colleges and universities, scores of educational, training, and informative conferences, seminars, and courses each year. The Association has conducted nationwide crime prevention programs and has worked with state and local governments in promulgating mutual aid concepts and contracts for more effective enforcement of the laws.

The interest of *amici* in the instant case stems from the importance of the issue involved, the resolution of which will have a direct and material impact upon the effectiveness of law enforcement. The question directly at issue—whether the imposition and carrying out of the sentence of death for the crime of first-degree murder of a police officer under the law of Louisiana violates the Eighth and Fourteenth Amendments to the Constitution of the United States—raises important legal and practical problems for police officers nationwide.

Police officers (and other law enforcement officers) constitute the sole line of defense between society and its criminal elements. They deserve the full measure of protection of the law. This is the area wherein our interest lies.

Respectfully submitted,

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ARGUMENT.

I. The Narrowly Drawn Louisiana Statute Which Provides a Mandatory Death Penalty for the Killing of a Peace Officer Does Not Violate the Eighth and Fourteenth Amendments to the Constitution of the United States.

Amici will not reiterate the legal arguments made by the Respondent State of Louisiana in the instant case, although we agree with and wish to associate ourselves with them. We will

confine our argument to one point: the crime of murder of a police officer, as it is narrowly defined in the Louisiana statute,[1] is so heinous that there can be no circumstances in mitigation for the crime; or, phrased another way, the lack of a specific provision for mitigating circumstances in the capital murder of a police officer statute under review should not render it constitutionally infirm.

In the case of *Stanislaus Roberts* v. *Louisiana*,[2] a plurality of this Court held that the mandatory death penalty statute of the State of Louisiana was violative of the Eighth and Fourteenth Amendments to the Constitution of the United States, principally because the law provided:

> . . . no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the particular offender.[3]

The decision in *Stanislaus Roberts* struck down five classes of first-degree murder which required a mandatory death sentence in Louisiana.[4] Among them was the following provision:

> No. 30 First degree murder.
>
> First degree murder is the killing of a human being:

1. La. Rev. Stat. Ann. 14:30 (2) (1973).

2. Because the surname of the defendant in the instant case is identical with that of the defendant in the earlier case of *Roberts* v. *Louisiana*, ... U. S. ....., 96 S. Ct. 3001 (1976) we will refer in this brief to both the given name and surname of the two. *Harry Roberts* v. *Louisiana*, is the style of the instant case, *Stanislaus Roberts* v. *Louisiana*, the earlier one.

3. *Stanislaus Roberts* v. *Louisiana*, ... U. S. ..... at ....., 96 S. Ct. 3001 at 3006 (1976). The term "plurality" is used because only Justices Stewart, Powell and Stevens held the statute unconstitutional in that the death sentence for capital murder was *mandatory*.

Mr. Justice Brennan and Mr. Justice Marshall concurred with the plurality because of their views that capital punishment is *per se* cruel and unusual under the Eighth and Fourteenth Amendments to the Constitution of the United States. The Chief Justice, Mr. Justice White, Mr. Justice Blackman and Mr. Justice Rehnquist dissented in *Stanislaus Roberts* on the grounds that narrowly drawn mandatory death penalty statutes are not unconstitutional.

4. La. Rev. Stat. Ann. 14:30 (1974).

> (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties . . .[5]

Stanislaus Roberts and its companion case, *Woodson* v. *North Carolina*[6] appeared to hold with finality that mandatory death penalties which did not take into consideration circumstances in mitigation of the crime were *per se* unconstitutional. However, on December 1, 1976 this Court certified the question in the instant case:

> Whether the imposition and carrying out of the sentence of death for the crime of first-degree murder of a police officer under the law of Louisiana violates the Eighth and Fourteenth Amendments to the Constitution of the United States.[7]

We can only conclude that this Court is now willing to reconsider the question of the constitutionality of narrowly drawn mandatory death penalty statutes which deal with specific and particularly heinous crimes, even though mitigating circumstances for the crime are not spelled out in the statute.

If this be the case, we can think of no more appropriate vehicle for review than the instant case. It involves the wilful and unprovoked murder of one police officer, and the wounding of another, by Petitioner, Harry Roberts, as the officers ap-

5. *Ibid*, subsection (2).

6. .....U. S. ....., 96 S. Ct. 2978 (1976).

7. 20 Cr. L. 4083 (December 1, 1976). Actually, the Louisiana Statute makes capital the murder of a *peace* officer defined as:

> . . . any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorney's investigator. La. Rev. Stat. Ann. 14:30 (1974).

While we agree that each of the enumerated classes of officers designated as "peace officers" in the statute are properly included in that definition, the express language in the order granting review in the instant case refers specifically to "police" officers. 20 Cr. L. 4083 (December 1, 1976). Accordingly, we feel constrained to limit our argument herein to those cases, such as the instant case, in which a police officer (or deputy sheriff) was killed.

proached him after he had fired blindly into a crowd and wounded a 13-year-old boy.

A careful reading of *Stanislaus Roberts* and *Woodson, supra,* leads to the conclusion that the principal reason that the mandatory death penalty statutes failed to pass constitutional muster was the fact that no provision had been made for consideration of mitigating circumstances. However, we submit that certain narrowly defined categories of a murder are so heinous that, by their very nature they preclude the presence of mitigating circumstances, or *at least* any such circumstances which would render the mandatory nature of the penalty constitutionally invalid.

Such a statute is the capital murder of a police officer statute of the State of Louisiana which is under review in the instant case. Our analysis of the factors which we believe to support this contention will be divided into three separate but intertwined elements: the narrowness of the statute, the state of mind of the murderer and the status of police officers in our society, all of which preclude the presence of mitigating circumstances or at least those of sufficient constitutional importance and validity as to prohibit the mandatory death penalty.

A. The Crime of Capital Murder of a Police Officer Has Been Defined with Sufficient Narrowness and Specificity by the State of Louisiana to Preclude Mitigating Circumstances.

The Louisiana statute defining capital murder of a police officer is *very* narrowly drawn. It is only applicable if the prosecution can prove, beyond a reasonable doubt, that: 1) there was a *specific* intent to kill the police officer (or to inflict great bodily harm which resulted in the officer's death) and, 2) the officer was in the performance of his *lawful* duties.

We do not contend that there can *never* be mitigating circumstances in the killing of a police officer, horrifying as all such crimes may be; we merely contend that such circumstances, if they existed, would rule out a conviction for capital murder

under the statute. We concede that certain factual situations could reduce the killing of a police officer to a crime of lesser degree: accidental killing, lack of knowledge that the victim was a police officer, the fact that the police officer was not engaged in the performance of his official duties, and misconduct on the part of the officer.

But these are precisely the kinds of mitigating circumstances that the Louisiana statute, by its carefully drawn narrowing of the definition of capital murder of a police officer, has taken into consideration. If these circumstances were present, no conviction for capital murder would lie.

This contention can be illustrated with hypothetical examples:

1. The offender, in the commission of an armed robbery, is surprised by a policeman. He flees, dropping his pistol which accidentally discharges, killing the officer. There would be no "specific intent" to kill the officer as required by the statute, hence the crime would not be capital murder.
2. The offender, a narcotics dealer, shoots and kills an undercover police officer, not knowing that the victim is a police officer, in the belief that he is a "rip-off artist" who is going to rob him of his narcotics or money. Although the offender would be guilty of murder, it would again seem clear that the "specific intent" language in the statute would bar a verdict of capital murder.
3. A police officer engages in a quarrel with his neighbor, unrelated to his duties, draws his gun, and the neighbor shoots and kills the officer in self-defense or perhaps in a struggle over the gun. However the factual situation in such a case were to be resolved, a verdict of capital murder would necessarily be precluded, because the officer was not in the performance of his duties.

4. An officer, off duty but armed, is intoxicated in a bar and gets into an altercation with a noisy patron with a resultant fatal injury to the officer. This situation could not invoke the capital murder provision because the officer, being intoxicated, would not have been in the *lawful* performance of his duties.

The Louisiana statute by its very narrow terms has, indeed, taken into consideration the principal mitigating circumstances involved in the killing of a police officer, at least those which might be of constitutional dimension in determining the validity of a mandatory death sentence.

Thus, we are left with the fact that Louisiana seeks to punish as capital murderers *only* those who wilfully, knowingly and with specific intent kill police officers in the performance of their lawful duties.

B. The State of Mind of Those Who Would Be Convicted of Capital Murder Under the Louisiana Statute Would, by Definition, Be Such That There Could Be No Mitigating Circumstances in a Given Case.

Mr. Justice Stewart, writing for the plurality in *Stanislaus Roberts*, cautioned that constitutional death penalty statutes must take into consideration the ". . . attributes of the particular offender."[8] If we assume that the State of Louisiana does not execute persons who are legally insane or of such tender age as to raise constitutional questions about the degree of punishment, which it does not;[9] the question of the "attributes" of the offender boil down to his state of mind at the time of the murder.

Our contention is that an individual who murders a police officer within the purview of the Louisiana statute can have only one of two states of mind: he murders to keep from being detected or arrested for some previous crime or to escape from

8. ..... U. S. ..... at ....., 96 S. Ct. 3001 at 3006 (1976).
9. La. Rev. Stats. 14:13, 14:14 (1942).

custody; or he kills the officer simply because the victim *is* a law enforcement officer. If either of these states of mind are present, we submit that there can be no further circumstances in mitigation, certainly not those that would rise to a constitutional level.

The *Uniform Crime Reports* of the Federal Bureau of Investigation break down situations in which law enforcement officers are feloniously (as opposed to accidentally) killed, into eleven categories.

Of 1,203 officers murdered between 1966 and 1975, the breakdown by type of law enforcement activity is as follows:

1) Responding to disturbance calls (family quarrels, man with gun, etc.) 157
2) Burglaries in progress or pursuing burglary suspects 65
3) Robberies in progress or pursuing robbery suspects 205
4) Attempting other arrests (excluding arrests for burglaries and robberies) 239
5) Handling, transporting, custody of prisoners 47
6) Investigating suspicious persons or circumstances..73
7) Traffic pursuits and stops 105
8) Civil disorders (mass disobedience, riots, etc.)...12
9) Handling mentally deranged persons 38
10) Ambush (entrapment and premeditation) 40
11) Ambush (unprovoked attack) .....42[10]

The first nine of these categories are situations in which law enforcement officers have come into confrontations with criminal suspects in some form of legitimate and necessary law enforcement activity and were murdered by those suspects. The

10. Clarence Kelley, "Crime in the United States, 1975," *Uniform Crime Reports*, Federal Bureau of Investigation, United States Department of Justice, Washington, D. C., August 25, 1976, p. 266.

conclusion is inescapable that had the slain officers not been acting in the lawful performance of their duties they would not have been killed.

Conversely, if the murders had *not* been engaged in some sort of illegal activity—the commission of a felony, fleeing from the scene of a felony, creating a disturbance or public menace, attempting to escape from custody, and so on—it is reasonable to assume that they would not have killed the officers.[11]

The principal motivating factor in all, or certainly in most, of these murders was sheer expediency on the part of the murderer: to avoid investigation, detection, apprehension, or, if apprehended, to escape.[12] The murder was committed simply to further the ends of the criminal; and if this state of mind on the part of the murderer exists, nothing can possibly be offered in mitigation.

Recent years have revealed yet another motivation for the murder of law enforcement officers: the fact that they *are* law enforcement officers. Categories 10 and 11 of police killings described above at page 7, concern ambush attacks on policemen: cases in which the officer was murdered in a premeditated, or at least an unprovoked, attack, for no other reason than the fact that he represented authority. There were 82 ambushes between 1966 and 1975 and, significantly, the number of such attacks rose from 29 between 1966 and 1970, to 53 between 1970 and 1975, almost double the number over the prior 5 years.[13]

11. The "Handling of Mentally Deranged Persons" classification of fatalities might well be excluded from this analysis; but this would have little bearing on our argument about the state of mind of the offenders, because the mentally deranged would generally be unable to form the specific intent for capital murder.

12. We believe that some credence may be given to this contention based on the fact that of 1,438 persons identified in the killing of law enforcement officers between 1966 and 1975, 76% had records of prior arrests or criminal charges and 56% had been convicted. They had had prior brushes with the criminal process, and arguably, they wanted to avoid repeating this situation. *Uniform Crime Reports, op. cit., supra,* ft. 10 p. 230.

13. *Ibid,* p. 226.

These are the kinds of attacks from which *no* police officer, no matter how alert or "street-wise" he may be, can protect himself. A policeman responding to a robbery-in-progress call can at least take certain precautions; a policeman walking into a house in response to a call for help cannot possibly know that a booby-trapped suitcase full of dynamite is awaiting him.[14]

Concededly, not *every* case involving the murder of a policeman can be neatly categorized into the two classifications which we have postulated: killing to avoid detection or arrest, or to escape; and killing because the victim happens to be a symbol of authority. However, the available data leads to the conclusion that *most* police killings fit into one of the two categories, and these are the murders that cannot be ameliorated.

The important point in our argument on this issue is that the Louisiana statute has, by its terms, screened out every other sort of police killing by defining it as other than capital murder. The requirement in the statute of *specific intent* to kill a police officer and the requirement that the officer be engaged in pursuing his *lawful* duties militate against a capital murder verdict unless the killing was, in fact, in one of the two categories: murder to avoid apprehension or to escape or murder by ambush. If this narrowing of the definition of the offense is sufficient, so that *only* those crimes of murder against the *exercise* of constituted authority or against the *appearance* of that authority are punishable as capital, it should be held to be constitutional as a legitimate exercise of the state's police power.

As we have noted, the presence of mitigating circumstances and a due consideration of the character and propensities of the offender are extremely important elements in capital murder cases. We believe, however, that these elements, even when viewed most charitably in favor of the accused, become secondary when the only conceivable state of mind of the capital

14. *Cf.* The factual situation in *Wolff, Warden* v. *Rice,* ..... U. S. ....., 96 S. Ct. 3037 (1976), decided by this Court last term, in which just such an ambush attack took place.

murder defendant (as defined by the Louisiana statute) could be to kill the officer out of expediency or to murder him solely and specifically because of what he represents. In sum, the very definition by Louisiana of the crime of capital murder of a police officer precludes circumstances in mitigation, which might exist in more broadly defined capital murder cases. Even if mitigating circumstances, not covered by the statute should exist, they would be so slight that their absence should not require that the statute, or a provision of the statute be stricken on constitutional grounds.

C. The Status of Police Officers in Our Society Mandates That One Who Feloniously Murders a Police Officer Forfeits His Claim to Circumstances in Mitigation.

Inherent in our contention that the wilful murder of a police officer, as defined by the Louisiana statute, forecloses circumstances in mitigation of the crime, is the premise that law enforcement officers should enjoy a specially protected stature in the criminal justice system. One could legitimately ask: why? Why should we accord to the life of a police officer or deputy sheriff a greater value than, say, that of a shopkeeper who has been murdered in the course of an armed robbery?

The answer to this question is, first, that no *life* is more important than another. Proponents of capital punishment agree that it is precisely because human life is so sacred that he who wilfully and feloniously takes a human life should pay for it with his own in order to express society's outrage at the crime[15] and to deter would-be murderers in the future.[16]

We submit, however, that there is at least one group of individuals—police officers—whose status alone qualifies them for inclusion in a class deserving of special protection against the lawless and violent. One writer on the capital punishment issue has summed up our view succinctly:

15. See *Gregg* v. *Georgia*, ... U. S. ..... at ....., 96 S. Ct. 2909 at 2930 (1976). Mr. Justice Stewart writing for the majority.

16. *Ibid* at 2931.

> As for the murder of law enforcement officers and prison guards, it is unrealistic for society to raise and maintain organizations in order that they might protect it from violence without giving these organizations protection from the violent men they will be obliged to confront.[17]

The operative words are ". . . obliged to confront," and we believe that these words embody the argument that police officers are entitled to special protection in our system.

The commission of crimes is, of course, elective. No one is ever *forced* to murder, rape, rob or otherwise prey upon someone else. People do so however, and then the series of confrontations involved in criminal justice begins: the offender elects to victimize and the victim (unless he or she is lucky enough to escape or to subdue the assailant) becomes an involuntary participant.

The average citizen—a civilian, not a law enforcement officer —when confronted, as a witness, with the commission of a crime, through personal observation or information, has a series of options: 1) he can play the good Samaritan and personally intervene (often at the risk of his life or to his own safety); 2) he can report the matter to the authorities even if he does not personally intervene; or 3) he can go on about his business leaving the matter up to the victim and the perpetrator (which happens with increasing frequency) and there is no legally effective manner whereby the "I don't want to get involved" passerby can be held accountable for his dereliction of a moral, if not a legal, duty.

A police officer or deputy sheriff has no such options. If information relating to the commission of a crime comes to his attention he is *required*, first by reason of his oath of office, and, more practically, upon pain of dismissal, to confront the criminal. In the words of the Kentucky Court of Appeals:

17. Dame Rebecca West, "Capital Punishment," *New York Times*, April 1, 1973, op ed. page.

> If [an officer] refuses to answer [a trouble] call, he may be summarily dismissed from the force.[18]

It is the police officer, and *only* the police officer who *must* respond and confront the obvious dangers which inhere in his duty to protect the rest of society. As we have noted above in the ten year period between 1966 and 1975, 1,203 law enforcement officers in the United States were feloniously killed in the line of duty. The increase in the numbers of such killings is equally disturbing: in 1966, 57 law enforcement officers were murdered; by 1975 the total had risen to 129—an increase of over 100%.[19] *Murders* of police officers are by far the most visible, and tragic, of such crimes but, additionally, in 1975 alone, 44,867 assaults on law enforcement officers were reported.[20]

Given these two conditions: the known and probable dangers of police work, and the fact that no one *except* a policeman is required to actively seek out confrontation with criminals, we submit that it is neither unreasonable nor unconstitutional to afford them the extra measure of protection which is implicit in the Louisiana statute.

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18. *City of Harlan* v. *Ford*, 252 S. W. 2d 684 (Ky. App. 1952). See also:

    Stafford v. *Firemen's and Policemen's Civil Service Commission of City of Beaumont*, 355 S. W. 2d 555 (Tex. App. 1962) where the officer was dismissed for failing to report the activities of known prostitutes and vagrants.

    Bagat v. *Police Board of City of Chicago*, 238 N. E. 2d 829 (Ill. App. 1968) where the officer was properly dismissed for failing to respond to eleven radio calls.

    Marino v. *City of Los Angeles*, 110 Cal. Rptr. 45 (Cal. App. 1973) where the officer was properly dismissed for failing to take any action on two occasions when victims of serious crimes reported the criminal activity to him.

    Van Gerrewey v. *Chicago Police Board*, 340 N. E. 2d 29 (Ill. App. 1975) where the officer was properly dismissed for failing to report the known impending sale of marijuana.

19. *Uniform Crime Reports*, 1975, p. 223.

20. *Ibid*, p. 231.

That statute is narrowed to cases in which the killing is wilful, with specific intent, and the officer is in the performance of his lawful duties. The facts of the instant case present this situation squarely.

Harry Roberts was on the street during Mardi Gras in New Orleans in 1974. He had a loaded weapon and had fired blindly at his neighbors striking a 13-year-old boy. He was clearly a danger to the community. Officers Tobin and McInerney responded to the radio call, arriving at the scene within minutes. They were in uniform, there could have been no question of mistaken identity of the officers.

Roberts was still in sight as the patrol vehicle approached, it caught up with him, whereupon Roberts, firing first, shot Officer Tobin and shot at Officer McInerney. McInerney returned the fire (hitting Roberts in the leg) and Roberts then shot and killed him.[21]

It was the option of all of the civilians in the area to retreat to safer places when Roberts, by the prior shooting, had proclaimed himself a dangerous armed man. No such option was available to Officers Tobin and McInerney. They had received the call and they were required to approach, disarm and apprehend the suspect. Roberts, as noted, shot at them first and then killed one of the officers and wounded the other in the ensuing gun battle.

There were no mitigating circumstances to this crime. It fits precisely within the scope of the three arguments we have made in this section:

1. There was no possibility of accident, mistake or abuse of police authority involved in the killing;
2. The state of mind of Harry Roberts could have been *only* to kill, or cause great bodily harm to, the police officers in order to effectuate his escape; and

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21. *State* v. *Roberts*, 231 So. 2d 12, 13 (1976).

3. The same criminal justice system that *required* Officers McInerney and Tobin to respond to the "man with a gun call" should be utilized to protect them.

It might well be said that this kind of crime was precisely what the legal draftsmen of the Louisiana capital murder of a police officer statute had in mind when La. Rev. Stat. Ann. 14:30 (2) was enacted. Only this kind of criminal behavior would fit within the purview of that statute.

We urge this Court to uphold the statute in question and consequently to decide that the mandatory death sentence of petitioner Harry Roberts did not violate the Eighth and Fourteenth Amendments to the Constitution of the United States.

CONCLUSION.

Certain mandatory capital punishment statutes may be constitutionally infirm because they contain no provision for consideration of circumstancse in mitigation of the offense. We submit, however, that the Louisiana Statute in question contains no such constitutional infirmity for two reasons: 1) it is so narrowly drawn that, by its terms, it precludes traditional circumstances in mitigation; and, 2) the crime that the statute seeks to make capital, murder of a police officer, is so heinous that there can be no circumstances in mitigation, at least none which rise to constitutional dimension.

For these reasons we respectfully urge the Court to uphold the decision of the Supreme Court of the State of Louisiana.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1976

NO. 76-5206

HARRY ROBERTS,
Petitioner,

-v.-

STATE OF LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

OBJECTION OF PETITIONER TO MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF RESPONDENT BY AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.; THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC.; THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC.; AND THE NATIONAL SHERIFFS ASSOCIATION, INC.

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Petitioner Harry Roberts hereby files an objection to the Motion for Leave to File a Brief as Amici Curiae on Behalf of Respondent, by the Americans for Effective Law Enforcement, Inc., et al; and pursuant to Rule 42(3), states the reasons of the petitioner for withholding consent to the filing of this brief:

I.

The State of Louisiana presently has no mandatory death penalty law punishing the murder of police officers. The law under which the petitioner was convicted and sentenced, former La. R.S. §14:30, was amended to exclude mandatory sentences by action of the Louisiana Legislature in 1976. See: La. Acts 1976, No. 657. The reason why Louisiana does not presently have in effect a mandatory death sentence for those convicted of the murder of police officers is due to legislative, and not judicial action. Even in the event that this Court should render a decision herein favorable to such a penalty, such a decision of itself could not reinstate such a penalty in Louisiana without some legislative act. The proposed amici would more appropriately direct their lobbying to the Legislature of Louisiana, and not to this Court.

II.

Since this case essentially involves only the validity of a mandatory sentencing scheme of one state, and since that scheme is no longer in effect, the arguments proposed by the amici--of a nationwide need for such sentencing provisions--would unjustifiably broaden the scope of the present inquiry beyond the issues necessary to a resolution of this matter, in that the amici would, by their arguments, be seeking from this Court an advisory opinion as to the possible validity of yet unenacted laws. Such an advisory opinion would be beyond the fixed definitions of this Court's powers,[1] and would so broaden the issues as to detract from the real purpose of the case: to consider the validity of a specific prosecution under former La. R.S. §14:30.

III.

Further, the proposed amici have not presented the Court with any reasons to believe that the real issues herein will not be adequately presented by the parties hereto. The purpose of an amicus curiae under Rule 42 is to do more than merely register a general endorsement of a particular party to the case. And unless the proposed amici can ". . .set forth facts or questions of law that have not been, or reasons for believing they will not adequately be, presented by the parties,"[2] the amici have not demonstrated the need or even the desireability of their involvement. No such showing has been made here.

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1. Flast v. Cohen, 392 U.S. 83, 95 (1968); U.S. v. Fruehauf, 365 U.S. 146, 157 (1961); Muskrat v. U.S., 219 U.S. 346, 362 (1911).

2. Rule 42(3).

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CONCLUSION

The actual effect of the proposed amici would be a lobbying campaign, which would more properly be directed to the Louisiana Legislature than to this Court. Further, since Louisiana no longer has a mandatory death sentence in effect, such as that under which the petitioner was sentenced, the involvement of the proposed amici would unjustifiably broaden the scope of the present case, so as to give the decision herein on such a broad ground an unprecedentedly advisory character. Finally, these proposed amici have failed to set forth reasons why the relevant issues herein will not be adequately addressed by the parties.

It is for these reasons that the petitioner respectfully urges the Court to deny the motion of these proposed amici for leave to file a brief herein.

All of which is most respectfully submitted.

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